No. 93-7901-CFH
Status: GRANTED
CAPITAL CASE

Title: Lloyd Schlup, Petitioner
v.
Paul K. Delo, Superintendent, Potosi Correctional Center

Docketed:
February 14, 1994

Court: United States Court of Appeals for the Eighth Circuit

Counsel for petitioner: O'Brien,Sean

Counsel for respondent: Jung,Frank A.

Entry	Date	Note	Proceedings and Orders
1	Feb 14 1994	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Mar 4 1994		Brief of respondent in opposition filed.
4	Mar 10 1994		DISTRIBUTED. March 25, 1994 (Page 10)
6	Mar 28 1994		Petition GRANTED. limited to Questions 1 and 2 presented by the petition.
			**********
8	Apr 25 1994		Order extending time to file brief of petitioner on the merits until May 27, 1994.
9	May 19 1994		Joint appendix filed.
10	May 27 1994		Brief amicus curiae of Five Innocent Former Death Row Inmates & Centurion filed.
11	May 31 1994		Brief of petitioner Lloyd Schlup filed.
13	Jun 6 1994		Order extending time to file brief of respondent on the merits until July 11, 1994.
17	Jul 8 1994	G	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae filed.
14	Jul 11 1994		Brief amici curiae of California, et al. filed.
15	Jul 11 1994		Brief of respondent Paul Delo, Superintendent filed.
16	Jul 15 1994		CIRCULATED.
18	Jul 20 1994		SET FOR ARGUMENT MONDAY, OCTOBER 3, 1994. (2ND CASE).
21	Jul 29 1994		Record filed.
		*	Partial proceedings United States Court of Appeals for the Eighth Circuit.
20	Aug 1 1994		Opposition of petitioner to motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae filed.
19	Aug 2 1994		Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae GRANTED.
22	Aug 8 1994		Record filed.
		*	Original proceedings United States District Court for the Eastern District of Missouri.
23	Aug 10 1994	X	Reply brief of petitioner filed.
24	Sep 8 1994		LODGING consisting of one copy of Rule 60(B) motion and two volumes of supporting exhibits filed in the U.S. District Court.

93-7901 No. ____ (2) ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

LLOYD E. SCHLUP, JR.,

Petitioner,

v.

PAUL DELO, Superintendent,
Potosi Correctional Center,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Court has established two standards for determining whether a denial of relief to a habeas corpus petitioner would constitute a miscarriage of justice, requiring the consideration of an otherwise-barred constitutional claim. Where the claim bears solely on a petitioner's capital sentence, Sawyer v. Whitley, 112 S.Ct. 2514 (1992) held the test is whether the petitioner can "show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty . . ." Where the claim bears on the integrity of a conviction, Kuhlmann v. Wilson, 477 U.S. 436 (1986) held that the test is whether the petitioner can make a "colorable showing of factual innocence."

This case presents two questions regarding these standards:

1. Whether the Sawyer standard or the Kuhlmann standard governs a claim regarding the determination of guilt or innocence in a capital case.

2. Whether, if Sawyer's test applies, it requires a habeas petitioner to show that the evidence of guilt was constitutionally insufficient to support conviction.

This case also presents the Eighth and Fourteenth Amendment question left open by Herrera v. Collins, 113 S.Ct. 853 (1993):

3. What constitutes the "truly persuasive" showing of innocence which will entitle a death-sentenced habeas petitioner to a hearing at which he can establish that his execution would violate the Constitution because he is actually innocent of the crime.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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LLOYD E. SCHLUP, JR.,

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v.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lloyd Schlup prays that a writ of certiorari will issue to review the judgment of the courts below, which denied him habeas corpus relief from a death sentence imposed for a crime he did not commit.

OPINIONS BELOW

The opinion of the divided panel of the United States Court of Appeals for the Eighth Circuit is published as Schlup v. Delo, 11 F.3d 738 (8th Cir. 1993); a copy is attached as Appendix A to this Petition. The Order of the Court of Appeals denying Petitioner's Suggestion for Rehearing En Banc, with a dissent by Chief Judge Arnold and two other judges, is attached as Appendix B to this Petition. The decision of the United States District Court for the

Western District of Missouri is unpublished, and is attached as Appendix C.

JURISDICTION

The decision of the Court of Appeals was issued on November 15, 1993. A Petition for Rehearing En Banc was denied on November 17, 1993. This Petition is being filed within 90 days of the earlier of those two dates.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

This case also involves the Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also involves Section 1 of the Fourteenth Amendment to the United States Constitution, which provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves 28 U.S.C. § 2244(b), which provides:

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the other application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

This case also involves 28 U.S.C. § 2254(a), which provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

This case also involves Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts, which provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

STATEMENT OF THE CASE

The decision below affirmed the summary dismissal of Petitioner's second federal habeas corpus petition, which alleged that his constitutional rights were denied at trial and in subsequent proceedings, and that he was actually innocent of the crime for which he convicted and sentenced to die.

1. The Trial, Appeal, and Prior Postconviction Proceedings.

Petitioner Lloyd Schlup was convicted and sentenced to death for the murder of Arthur Dade, a fellow prisoner at the Missouri State Penitentiary.

From the outset, Mr. Schlup denied any involvement in Mr. Dade's murder. Although he was arrested within minutes of the murder, no physical evidence linked him with the crime. The evidence against him consisted of the testimony of two correctional officers who claimed to have witnessed the murder--from a distance. Only one of these witnesses actually appeared before the jury; the testimony of the other was presented by deposition.

Petitioner's trial lasted only two days. He was represented at trial by court-appointed counsel, whom it is undisputed failed to interview several known eyewitnesses.[1] After his conviction was affirmed on appeal, State v. Schlup, 724 S.W.2d 236 (Mo.), cert. denied, 482 U.S. 920 (1987), he filed for post-conviction relief in the Missouri courts claiming, among other things, ineffectiveness of his trial counsel. The petition was quickly dismissed, with no inquiry into the evidence of Mr. Schlup's innocence.

> An evidentiary hearing was held at which Schlup's trial counsel testified, and the motion court ruled against Schlup, finding that his trial counsel had been effective. See Schlup v. State, No. CV187-3457CC (Circuit Court of St. Charles County, Mo., Nov. 6, 1987). The court accepted trial counsel's testimony, and found that the witnesses who were not interviewed were either not made known to trial counsel by Schlup or "were known not to have information which would assist the defense." Id. at 4.
>
> Schlup appealed this adverse decision, specifically alleging that trial counsel was ineffective for not interviewing the aforementioned witnesses. Appellant's Brief at 4, Schlup v. State, 758 S.W.2d 715 (Mo. 1988) (No. 70694). The Supreme Court of Missouri ignored this issue when it affirmed the motion court's decision. See Schlup v. State, 758 S.W.2d 715 (Mo. 1988) (en banc).
>
> Schlup then raised the issue in his pro se petition for federal habeas filed in the Eastern District of Missouri. ... The district court ruled summarily and without any basis that the claims raised in paragraphs A(1) and A(5), along with others, were "barred from further consideration" because of Schlup's "failure to assert them at trial, to include them in his motion for new trial, to brief them on appeal, or to pursue them in [his] post-conviction proceedings." Schlup v. Armontrout, No. 89- 0020C(3), slip op. at 6 (E.D. Mo. May 31, 1989), aff'd, 941 F.2d 1062 (8th Cir. 1991), cert. denied, 112 U.S. 1273 (1992).

Appendix A-25-26.

Thus, despite the efforts of Mr. Schlup and his family to get counsel to investigate the case, at no time in this first round of federal and state postconviction proceedings did any lawyer representing Mr. Schlup contact the witnesses who could testify in his behalf. In the initial state postconviction hearing, Mr. Schlup's appointed counsel was forced to go forward, although he had done no investigation and informed the trial court he was unprepared; after the trial court threatened counsel with jail if he did not go forward that day, as a result of an ex parte telephone call from the Chief Justice of the Missouri Supreme Court, William Billings, insisting that the case be moved along. See Appendix C-5. Mr. Schlup's habeas counsel also interviewed no witnesses--claiming that he was fearful of retaliation from Justice

[1]The murder happened in a crowded cell block of the Missouri State Penitentiary. Defense counsel made no attempt to canvass the crime scene or talk to several inmates who told prison officials that they saw the crime.

Billings, having previously subjected to disciplinary proceedings by the Missouri Bar (which exonerated him) as a result of a complaint against another Judge. Id.

Mr. Schlup was denied relief in both the state and federal courts, with no judge ever having seen or heard from the eyewitnesses to the crime who swear he was not involved.

2. The Proceedings Below.

After certiorari was denied from the first habeas appeal, the case was taken over by Petitioner's present counsel from the Missouri Capital Resource Center--whom the dissent below characterized as "the only truly competent counsel to have represented Schlup since the beginning." Appendix A-27, Heaney, J., (dissenting). Through those counsel, Mr. Schlup, for the first time, was able to gather and present the evidence of his innocence. The evidence was first submitted to the Missouri Supreme Court in the form of a renewed petition for a writ of habeas corpus, and an objection to the setting of a new execution date. Although Missouri law nominally places no limit on the time and opportunities for a claim of newly discovered evidence,[2] the submission was rejected on procedural grounds without any consideration of its substance. State ex rel. Schlup v. Delo, No. 74608 (Mo., March 5, 1992) (unpublished).

[2]A new trial on the basis of newly discovered evidence may be granted under Missouri Rule 91 (habeas corpus). Wilson v. State, 813 S.W.2d 833 (Mo. 1991) (en banc). ("Newly discovered evidence, if available, may better serve Wilson in a petition for writ of habeas corpus under Rule 91, see White v. State, 779 S.W.2d 571, 573 (Mo. banc 1989) . . ."). There is no time limit for the filing of a petition for writ of habeas corpus in Missouri.

Petitioner then filed the second habeas corpus petition in the District Court below. The petition was accompanied by affidavits of eyewitnesses who had never previously been contacted by Mr. Schlup's counsel, as well as statements from many of these witnesses that were acquired during the initial investigation by the Missouri prison authorities. In response, the State of Missouri submitted a number of witness statements from prisoners and other witnesses who were never called at trial--which added substantial additional support to Petitioner's claims. The resulting mass of new evidence--which was rejected by the District Court without a resolution of the factual issues it raises--was summarized in some detail by Judge Heaney's dissenting opinion below:

> Schlup presents five affidavits of eyewitnesses to the murder, none of whom were contacted by Schlup's defense counsel, none of whom testified at trial, and all of whom appear willing to give their testimony in open court. These witnesses describe firsthand the murder of "Stump" Dade, indicating unequivocally that Lloyd Schlup was not a perpetrator and was not even present.

Appendix A-14.[3] Although these witnesses were prisoners at the time, there is an unusual reason to credit their testimony: they are black and Mr. Schlup is white. Dade was a black man, and his murder may have been racially motivated. Those involved were alleged to be members of a white supremacist group in the prison. Pierce is also black and adds the following: "I have no reason to lie for a white guy.... I know for certain that Lloyd Schlup did

[3]The evidence was summarized in greater detail in a factual appendix to the Petitioner's briefs filed in the Court of Appeals, a copy of which is attached to this Petition as Appendix D.

not kill Arthur Dade, and that he was not even present when Dade was killed."

In addition to the eyewitness testimony discussed above, Schlup also presents this court with new evidence in support of the alibi defense he presented at trial. That defense consisted of the testimony of several prisoners that Schlup had walked ahead of them to the dining room, the testimony of Lieutenant Faherty that he had spoken to Schlup outside the dining room, and the videotape that shows Schlup as the first inmate to arrive in the dining room.

The importance of the videotape is in the time lapse between when Schlup arrived, when the guards received a call over their radios about the attack on Dade, and when O'Neal and Jordan arrived. No one disputes that Schlup was first in line for lunch on February 3, 1984. The surveillance videotape of the dining room confirms this fact. According to the videotape, one minute and five seconds elapsed from Schlup's entrance into the dining room until the guards received a radio call about the fight. Twenty-six seconds after the guards responded to the radio call O'Neal ran into the dining room dripping blood. Prison investigator George Brooks testified at trial that one could run from the scene of the crime to the dining room in just over thirty seconds, with a brisk walk taking over a minute.

At trial it was believed that the radio call to which the dining room guards can be seen responding was made several minutes after the stabbing had occurred. Captain Eberle testified that he had radioed for help when he first arrived on the scene, which was several minutes after the stabbing. This would arguably have given Schlup time, as the state asserted in its closing arguments, to get to the dining room one minute before the call went out over the radio.

Schlup presents new evidence on this point, however, evidence that apparently was available at the time of trial but was not presented to the jury due to the ineffectiveness of Schlup's trial counsel. John Green, the eyewitness whose testimony is discussed above, did more than simply watch the stabbing on February 3. Sergeant Flowers called out for someone to call the base, and Green did just that. He told the prison investigators about this phone call when he was first interviewed: "I heard Sgt. Flowers calling for officers cause they had a fight. Couldn't get nobody so he told me to call base to notify them of the fight and that's what I did." Excerpt of Transcript of Inmate Interviews, Exhibit 4A in Support of Petition for Writ of Habeas Corpus (interview of John Green). This phone call took place just after he saw "inmate Dade fall right there in front of the office." Id.

Green's affidavit provides greater detail: "When I called base, it was within seconds of Dade hitting the ground. It could not have been more than a half minute or a minute after he was stabbed by Jordan and O'Neal. It happened very fast." Affidavit of John L. Green, at 4 (Sept. 7, 1993). [FN6]

Lieutenant Faherty has also expanded on his earlier trial and deposition testimony. He testifies that he was on duty at T-3, a door about halfway between Schlup's cell and the dining room that is kept locked except when inmates are moving from one place to another. When T-3 was opened from base control at his direction, he saw Schlup "coming down the corridor.... He was walking a leisurely pace with his hands in his pockets." Affidavit of Robert Faherty, at P 4 (Oct. 26, 1993). Schlup stopped at a window to yell at someone outside, Faherty reprimanded him, and Schlup walked to T-3. Faherty "patted him down, and he went to the dining room. [Schlup] was not perspiring or breathing hard, and he was not nervous." Id. Faherty was relieved from T-3 shortly after Schlup passed through, and Faherty then went to the dining room. He estimates that Schlup was in his presence (presumably from the corridor the other side of T-3 and into the dining room) for two-and-a-half to three minutes. It would take Schlup another thirty seconds to walk from his cell to where he first entered Faherty's line of sight. Id. at P 6. Counting the minute in the dining room prior to the radio call (when he was presumably in Faherty's presence as well), Schlup left his walk at least three to three-and-a-half minutes before the radio call. [FN7] If the radio call came in response to John Green's phone call, it is impossible, as Faherty asserts, for Schlup to have participated in Dade's murder.

Given the timing of this call for help and the evidence presented at trial (the videotape, the testimony of Lieutenant Faherty, and the testimony of Brooks on how long it takes to move from the scene of the crime to the dining room), it is not possible that Schlup could have participated in Dade's murder and been in the dining room as the videotape indicates. In short, Lloyd Schlup could not have been in two places at the same time. O'Neal arrived nearly thirty seconds after the radio call, and the prosecution's testimony establishes that he took off at a run. He was followed into the dining room by Randy Jordan. Rodnie Stewart had already been detained. Meanwhile, as Schlup has maintained since the beginning, he was simply in the dining room eating his fish sandwich.

Id. at 20-24.

In addition to this, during the proceedings below Petitioner's counsel developed important evidence tending to impeach the testimony of the two correctional officers whose witnesses supported the prosecution's case at trial. One of them, John Maylee, turned out to have three prior felony convictions of which the jury was never told. See Appendix A-33, n.14. The other, Roger Flowers, was fired from the prison shortly after the Dade murder; and a number of the newly located witnesses testified (as did Mr. Maylee) that Mr. Flowers was away from his post, and did not actually witness Arthur Dade's murder, as he had testified at trial.

Without hearing any of this evidence, the District Court and the panel majority below found Petitioner's showing of innocence insufficient--although "the District Court indicated that Schlup presented a stronger case than did [Leonel] Herrera...." Appendix A-33.[4] The dissenting judge of the panel (and three dissenters

[4]The Court of Appeals majority was skeptical of Petitioner's new evidence--largely because it came from prisoners, many of whom had failed to report their observations to prison investigators immediately after the crime. See App. A-11. Because none of these prisoners had ever been called to testify, there is no definitive way to gauge their credibility or the reasons for these apparent inconsistencies. However, as Judge Heaney observed with regard to one of them, John Green:

> While this inconsistency would need to be explored on remand, I believe it is fairly easily explained. Green was at that time still in prison and justifiably afraid for his well-being. It was probably in his interest to say that he had arrived just after the stabbing as he then indicated. Now that he has been out of prison for seven years, he no longer is afraid to let the truth be known.

App. A at 15, n. 2 (Heaney, J., dissenting). Furthermore, since it was the state which disclosed Green's statement in the course of habeas proceedings, and his most recent statement was obtained only after a concerted effort to locate him at his job at a dairy farm in south-central Nebraska, the possibility of collusion between Green and petitioner is inconceivable.

from the denial of rehearing en banc) disagreed, finding that, on its face, the evidence was "truly persuasive." Ibid.

The majority of the Court of Appeals panel held that Mr. Schlup's constitutional claims were barred, and that his proffered evidence of innocence was insufficient to preclude his execution under the Eighth Amendment. In upholding the procedural bar, the panel adopted by reference the District Court's decision that there was no "cause" for the failure to previously present the new evidence of innocence, despite the fact that Mr. Schlup had repeatedly asked his appointed lawyers to do so. Appendix A-3; see Appendix C-4-6. The panel majority found that the "miscarriage of justice" exception to the rule of procedural default did not apply, holding the new evidence did not meet the standard of Sawyer v. Whitley, 112 S.Ct. 2514 (1992), which it equated with the constitutional rule of Jackson v. Virginia, 443 U.S. 307 (1979). Appendix A-5. Applying similar reasoning, the Court of Appeals panel rejected Mr. Schlup's claim that, because he was actually innocent of the crime, his execution would violate the Eighth Amendment. Appendix A-12. Senior Judge Heaney dissented from the panel opinion, reviewing the evidence of innocence at length and concluding that it met both the test of a "miscarriage of justice" under Sawyer, and a "truly persuasive" showing of actual innocence under Herrera v. Collins, 113 S.Ct. 853 (1993). An expedited petition for rehearing en banc was rejected, over the dissents of

Chief Judge Arnold and two other active Circuit Judges. Appendix B.

On November 18, 1993--the day after the Court of Appeals denied rehearing en banc, and the day before Mr. Schlup's scheduled execution--the Governor of Missouri granted a stay of execution and ordered a special panel to be assembled to evaluate the evidence of Mr. Schlup's innocence, and make recommendations to him regarding the exercise of his clemency power.[5] That process is continuing as of this date.

REASONS FOR GRANTING THE WRIT

As the dissenting Circuit Judge below observed, "if ever there were a case in which the Supreme Court might wish to clarify the law on this issue, this is the one. Schlup has presented a strong case of actual innocence...." Appendix A-30. The extraordinary facts of this case, and the decisions below, frame quite precisely several issues regarding claims of innocence in capital cases, on which lower courts are in need of this Court's guidance.

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A DIVISION AMONG THE COURTS OF APPEALS REGARDING THE TEST TO APPLY TO CLAIMS OF MISCARRIAGE OF JUSTICE AT THE GUILT PHASE OF A CAPITAL CASE.

The principal issue on which the judges of the Court of Appeals below were divided was whether Petitioner's miscarriage of

[5]The order from Missouri Governor Mel Carnahan staying Mr. Schlup's execution came shortly after a polygraph test was administered to John Green by Mr. Don Dunlap, a retired police officer who had served more than 15 years as Chief Polygraphist in the Kansas City, Missouri, Police Department. No deception was indicated when Green said that he saw the crime, Mr. Schlup was not involved, and he called b[illegible]e as soon as Officer Flowers told him to do so.

justice claim should be evaluated under the test of Sawyer v. Whitley, 112 S.Ct. 2514 (1992), or that of Kuhlmann v. Wilson, 447 U.S. 436 (1986). As summarized by the majority decision below:

> Sawyer dealt with the punishment phase of the criminal proceeding as opposed to the guilt or innocence phase of the trial. Therefore, appellant argues, with some justification, that Sawyer announced only a test for analyzing the fairness of the death penalty portion of a trial. And, the Supreme Court did say, in Sawyer, with regard to guilt or innocence:
>
> > Our standard for determining actual innocence was articulated in Kuhlmann as: "[T]he prisoner must 'show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.' " Sawyer, 112 S. Ct. at 2519, n.5 (citations omitted).
>
> On the other hand, Sawyer says that "actual innocence" under the death penalty phase of a case must be determined by considering whether a "petitioner has shown by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty." Id. at 2523. Says appellant, this seemingly higher (penalty) test is necessary because the amorphous concept of being actually "innocent of death" requires a more objective standard. Id. at 2519-20. In other words, in the context of guilt or innocence of the crime itself, the concept of "actual innocence" is easier to grasp. Id. at 2520. Thus, the more subjective Kuhlmann test is sufficient.
>
> Whatever the merits of appellant's contentions, we do not write on a clean slate. We must reject appellant's argument because in this circuit "the new standard [required by Sawyer] applies equally to challenges to a conviction, not just challenges to a death sentence." McCoy v. Lockhart, 969 F.2d 649, 651 (8th Cir. 1992). And, the imprimatur of this court en banc was stamped on the McCoy holding in Cornell v. Nix, 976 F.2d 376 (8th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1820 (1993). Accordingly, we make our determination of whether Mr. Schlup's claim of actual innocence opens the gateway to our consideration of his constitutional claims on that basis.

Appendix A-4-5.

As Chief Judge Arnold noted in his dissent from the denial of rehearing below, there is real reason to doubt whether the Court in Sawyer intended to supplant the Kuhlmann test for claims of miscarriage of justice at the guilt phase of capital trials.

> In McCoy, we held that a miscarriage of justice for purposes of avoiding procedural defenses can be found only when petitioner has shown by clear and convincing evidence that but for the constitutional error', no reasonable juror could find him guilty. 969 F.2d at 651. The McCoy Court lifted this standard from Sawyer v. Whitley, 112 S.Ct. 2514 (1992), a case having to do only with the question of punishment, not that of guilt or innocence.
>
> As our panel in the present case acknowledged, there is some warrant for Schlup's argument that Sawyer was intended by the Supreme Court to apply only to questions of punishment, and that the Sawyer opinion itself preserves unchanged, for purposes of the guilt-phase, the earlier standard of Kuhlmann v. Wilson, 477 U.S. 436 (1986) (requiring a petitioner to show a fair probability that, in light of all the evidence, the jury would have entertained a reasonable doubt of his guilt). See Sawyer, 112 S.Ct. at 2519 n.5.

Appendix B-1-2. As Judge Heaney wrote in dissent, the Eighth Circuit's McCoy decision effectively holds that Sawyer overruled Kuhlmann.

> Under the Supreme Court's decisions on actual innocence, the standard to be applied in this case is stated in Kuhlmann v. Wilson, 477 U.S. 436 (1986), in which Justice Powell stated the requirement
>
> > that the prisoner must "show a fair probability that, in light of all the evidence, ... the trier of fact would have entertained a reasonable doubt of his guilt." Thus, the question whether the prisoner can make the requisite showing must be determined by reference to all probative evidence of guilt or innocence.
>
> Id. at 454 n.17 (Powell, J., for a plurality) (quoting Henry Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970) (footnote omitted)) (emphasis in original). I believe that Schlup has met this standard, but, as the majority correctly notes, our court has applied a different standard,

> essentially reading the Supreme Court's decision in Sawyer as implicitly overruling Kuhlmann in this regard.

Appendix A 28-29. The Eighth Circuit's alteration of Sawyer to fit guilt phase issues such as those in this case was made graphically evident in the concluding passage of its opinion on this issue:

> Thus, Mr. Schlup, like Herrera, attempts to seek a federal court retrial of his state court prosecution and falls well short of showing "by clear and convincing evidence [that] no reasonable juror would find him [guilty of murder.]" Sawyer, 112 S. Ct. at 2523.

Appendix A-11 (brackets in original). By so modifying Sawyer's rule, the Eighth Circuit appears to have misunderstood Sawyer's logic and overlooked the Court's citation of Kuhlmann as the standard for guilt phase claims. More importantly, the decision below--which acknowledged doubts about its correctness, and was issued over the objections of four dissenting Circuit judges--is part of a substantial split among the Courts of Appeals with regard to this issue. At least two other circuits have held to the contrary, that Sawyer should be limited to claims affecting the propriety of death sentences in capital cases and that Kuhlmann and McCleskey still apply to constitutional claims raising issues of innocence of the underlying crime. Montoya v. Collins, 988 F.2d 11, 13 (5th Cir. 1993); Kirkpatrick v. Whitley, 992 F.2d 491 (5th Cir. 1993); Campbell v. Blodgett, 982 F.2d 1321, 1331 (9th Cir. 1992). The Eighth Circuit's broad reading and application of Sawyer exceeds the scope for which that test was intended by the Court, and is in clear conflict with opinions from other circuits. For both these reasons, certiorari is appropriate here. Rule 10.1(a).

A resolution of this dispute is particularly important because of the gravity of the issues it involves, and the rapidity with which those issues often need to be resolved. In Missouri, as in many other states, there is a serious shortage of qualified counsel to represent capital defendants in post-conviction proceedings:

> A second serious problem with the current system is the pressing need for qualified counsel to represent inmates in collateral review. . . . This situation is not likely to be cured by the new provisions of the anti-drug abuse act of 1988 that require the appointment of counsel in capital habeas corpus proceedings.
>
> Capital inmates are almost uniformly indigent, and often illiterate or uneducated. Capital habeas litigation may be difficult and complex. Prisoners acting pro se, rarely present promptly or properly exhaust their constitutional challenges in the state forum. This results in delayed or ineffective federal collateral procedures. The end result is often appointment of qualified counsel only when an execution is imminent. But at this stage, serious constitutional claims may have been waived. The belated entry of a lawyer, under severe time pressure, does not do enough to ensure fairness.

Report of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, 45 Crim. L. Rptr 3239, 3240 (Sept. 27, 1989). Mr. Schlup's case is anecdotal proof, as this Court is aware, habeas petitioners too often do not obtain counsel willing or able to investigate their claims of innocence until an execution is impending.[6] Where such investigations produce evidence of actual innocence, federal courts often find themselves forced to resolve the most serious and

[6]"It must be recognized that the growing death row population [in Texas] requires increased counsel resources, while the present system discourages the appointment of counsel." The Hon. Edith Jones, "Death Penalty Procedure: A Proposal for Reform," 63 TEX. B.J. 850, 851 (1990). Accord, see the briefs in this court by Petitioner and amici, Texas Criminal Defense Lawyers Association and the American Bar Association, in McFarland v. Collins, No. 93-6497.

fact-intensive sorts of claims, under expedited and difficult conditions. In such circumstances, clear guidance from this Court is especially important. Certiorari should be granted in this case to provide it.

II. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER SAWYER PRECLUDED RELIEF IN ALL CASES WHERE THE TRIAL EVIDENCE WAS SUFFICIENT TO SUPPORT A CONVICTION.

Not only did the Court of Appeals modify the Sawyer decision to fit this guilt phase claim, it also subtly changed it to increase the threshold showing that a habeas petitioner must make to establish a "miscarriage of justice" under its standard. The Court in Sawyer quite clearly--and apparently quite deliberately--stated the question was whether a reasonable juror "would" find the defendant eligible for the death penalty, see Sawyer v. Whitley, 112 S.Ct. at 2523. The Court of Appeals below equated Sawyer's test with that of Jackson v. Virginia, 443 U.S. 307 (1979), which measures the sufficiency of evidence at trial to support a conviction and holds that proof of guilt is constitutionally insufficient only where no rational factfinder "could" have found all elements proved beyond a reasonable doubt. 443 U.S. at 319; see Wright v. West, 112 S.Ct. 2482, 2485 (1992).

Although the Court of Appeals did not explicitly state that it was equating Sawyer's standard with Jackson's, the logic of its decision made clear that it was doing so: it held dispositive the fact that there was eyewitness testimony supporting Petitioner's conviction, and refused to examine the credibility of that

testimony or weigh it against contrary evidence. This is what it said:

> At trial, as noted by the district court, two prison officials, who were eyewitnesses to the crime, positively identified Mr. Schlup as one of the three perpetrators of the murder. This evidence was clearly admissible and stands unrefuted except to the extent that Mr. Schlup now questions its credibility. Witnesses' credibility, however, is an issue reserved for the trial jury. It is not a matter within the province of the district court or of this court in a habeas proceeding. Federal habeas, as explained in Herrera, does not provide a forum for the retrial of a convicted felon. Herrera v. Collins, 113 S. Ct 853, 860-61 (1993). So, even if we disregard the source of the new evidence, the eleventh-hour nature of the information, and a presentation coming almost six years after the trial; it is simply not possible to say that the appellant has shown by clear and convincing evidence that but for a constitutional error no reasonable jury would have found him guilty. Therefore, there is no basis for sustaining the motion for stay, Delo v. Blair, 113 S. Ct. 2922 (1993), or for reversing the district court.

App. A-6-7. The dissenting judge took a different view, observing that a jury, upon hearing the additional evidence, might well be compelled to acquit Mr. Schlup: "Had trial counsel presented the exculpatory eyewitnesses now presented, the jury would have received the full picture of Dade's murder, and if it were to credit the new evidence, it would have no choice but to acquit." Appendix A-24, n. 8 (Heaney, J., dissenting).

The Court of Appeals' equation of Sawyer with Jackson overlooks the careful language the Court used in announcing its decision in Sawyer. The Court in Sawyer said, quite explicitly and apparently deliberately, that the test was whether, in the absence of constitutional error a "reasonable juror would find [the petitioner] eligible for the death penalty." Sawyer v. Whitley,

112 S.Ct. at 2523. Although, as Chief Judge Arnold observed in his dissent below, that language is "quite close" to the sufficiency of the evidence test in Jackson v. Virginia, its difference is critical. For, under Jackson, a conviction cannot stand consistent with the Sixth Amendment if there is not sufficient evidence to support all its elements, beyond a reasonable doubt. If Sawyer's test is the same as Jackson's, in every case where the Sawyer could be met, the conviction would be separately unconstitutional because of the insufficiency of the trial evidence.

Mr. Chief Justice Rehnquist, writing for the majority in Sawyer, considered the question of whether the miscarriage of justice standard should be based on what the jury "would" find, as opposed to what it "could" find, and opted for the former:

> The Court of Appeals in this case took the middle ground among these three possibilities for defining "actual innocence" of the death penalty, and adopted this test:
>
> "We must require the petitioner to show, based on the evidence proffered plus all record evidence, a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty." 945 F. 2d, at 820 (footnotes omitted).
>
> * * * *
>
> The Eleventh Circuit articulated the following test:
>
> "Thus, a petitioner may make a colorable showing that he is actually innocent of the death penalty by presenting evidence that an alleged constitutional error implicates all of the aggravating factors found to be present by the sentencing body. That is, but for the alleged constitutional error, the sentencing body could not have found any aggravating factors and thus the petitioner was ineligible for the death penalty. In other words, the petitioner must show that absent the alleged constitutional error, the jury would have lacked the discretion to impose the death penalty; that is, that he is ineligible for the death penalty." Johnson v. Singletary, 938 F. 2d 1166, 1183 (CA11 1991) (emphasis in original).

Sawyer v. Whitley, 112 S. Ct. at 2524 and 2525, n.15. (emphasis added). Having examined the two alternatives, the Court adopted the standard employed in the fifth circuit:

> Therefore we must determine if petitioner has shown by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty under Louisiana law.

At least five times in his opinion, the Chief Justice refers to the standard being adopted by the court as whether a reasonable juror "would find the defendant eligible for the death penalty." 112 S.Ct. at 2524-25.

Though the distinction may seem subtle, in practical application, it is of critical importance. Under the standard adopted by the court below, positive evidence of innocence could never satisfy the test because the record of conviction is presumably based upon evidence that the jury could believe. Under this standard, if Mr. Schlup's evidence had consisted of a videotape of the crime itself, showing that Mr. Schlup was not involved, the court would still be bound to deny consideration of the petition because of the identification testimony in the record, no matter how impeachable it might be.[7] Any case based on eyewitness testimony, no matter how unreliable, must be denied under the standard below, which under all circumstances prohibits consideration of positive evidence of innocence.

[7]In this case, in light of the affidavit of former Corrections Officer Robert Faherty, see Appendix E, the surveillance videotape is the substantial equivalent of a videotape of the actual crime.

That this Court did not intend the application of such a harsh standard is evident not only in Sawyer, but in the past decisions of this Court cited with approval by the Chief Justice in Sawyer. In particular, he noted the analysis of Justice O'Connor in Smith v. Murray, 477 U.S. 527 (1986), in which the Court decided that "the habeas petitioner in that case had failed to show actual innocence of the death penalty because the 'alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones.' Id., at 538." 112 S.Ct. at 2519. The standard applied below completely disables the court even if constitutional error precludes the development of true facts, yet Justice O'Connor's words clearly continue to be an important part of the Court's jurisprudence. Likewise, the Kuhlmann test clearly envisions the more flexible, balanced approach described by Justice O'Connor in which all the evidence is examined:

> "The prisoner must 'show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.'"

Kuhlmann v. Wilson, 477 U.S. at 455, n.17. (emphasis added). Even the example of a claim that the Chief Justice recognized as potentially satisfying the guilt/innocence miscarriage of justice test would be dead on arrival under the standard applied below:

> A federal district judge confronted with a claim of actual innocence may with relative ease determine whether a submission, for example, that a killing was not intentional, consists of credible, noncumulative and admissible evidence negating the element of intent.

Sawyer v. Whitley, 112 S.Ct. at 2522.

We believe the Court of Appeals majority has gone beyond what this Court carefully said in Sawyer, and set a standard that is impossibly high. In effect, the panel's standard would make it impossible to preserve a claim of constitutional error by establishing a "miscarriage of justice", in any case where the evidence was sufficient to convict. This would preclude a finding of a miscarriage of justice even in the archetypical case--which this case approximates--in which there is indisputable, photographic evidence showing the defendant was not guilty, so long as there was some other evidence that showed he was. Since jurors may infer guilt from implausible claims of innocence, see Wright v. West, supra, this would mean no defendant who testified in his own behalf could ever later claim a "miscarriage of justice" even if he produced evidence which established his innocence with scientific certainty.

We do not believe that this is what the Court intended, even if it meant to extend Sawyer's test to guilt and innocence claims. Had the Court meant to adopt Jackson's standard, it could easily have done so. But its careful choice of language suggests that it had in mind the rationale of the rule it was applying: avoidance of executions which are clearly wrongful, despite the existence of evidence which is technically sufficient to justify them. Such miscarriages of justice surely can occur as easily from the omission of plainly exculpatory evidence, as from the admission of evidence which is constitutionally improper.

If Sawyer's test does supplant Kuhlmann's generally, at least it must be given the flexibility the Court apparently intended, to achieve the purpose the Court was seeking. Certiorari should be granted here to clarify that.

III. CERTIORARI SHOULD BE GRANTED HERE TO DETERMINE WHAT CONSTITUTES THE "TRULY PERSUASIVE" SHOWING OF INNOCENCE WHICH REQUIRES AN EVIDENTIARY HEARING TO DETERMINE IF A PETITIONER'S EXECUTION WOULD VIOLATE THE EIGHTH AMENDMENT.

The Court, in Herrera v. Collins, supra, assumed that the execution of a prisoner who can make a truly persuasive showing of innocence would violate the constitution:

> I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution. Regardless of the verbal formula employed -- "contrary to contemporary standards of decency," post, at 1 (dissenting opinion) (relying on Ford v. Wainwright, 477 U.S. 399, 406, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986)), "shocking to the conscience," post, at 1 (relying on Rochin v. California, 342 U.S. 165, 172, 96 L. Ed. 183, 72 S. Ct. 205 (1952)), or offensive to a "' "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," '" ante, at 16 (opinion of the Court) (quoting Medina v. California, 505 U.S. . . . . (1992) [*49] (slip op. 7-8), in turn quoting Patterson v. New York, 432 U.S. 197, 202, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977)) -- the execution of a legally and factually innocent person would be a constitutionally intolerable event.
>
> * * * *
>
> Exercising restraint, the Court and JUSTICE WHITE assume for the sake of argument that, if a prisoner were to make an exceptionally strong showing of actual innocence, the execution could not go forward. JUSTICE BLACKMUN, in contrast, would expressly so hold; he would also announce the precise burden of proof. Compare ante, at 26 (opinion of the Court) (We assume, "for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional and warrant federal habeas relief if there were no state avenue open to process such a claim"), and ante, at 1 (WHITE, J., concurring in judgment) (assuming that a persuasive showing of actual innocence would render a conviction unconstitutional but explaining that, even under such an assumption, "petitioner would at the very least

> be required to show that based on proffered newly discovered evidence and the entire record before the jury that convicted him, 'no rational trier of fact could [find] proof of guilt beyond reasonable doubt.' Jackson v. Virginia, 443 U.S. 307, 314, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)"), with post, at 14 (dissenting opinion) ("I would hold that, to obtain relief on a claim of actual innocence, the petitioner must show that he probably is innocent"). Resolving the issue is neither necessary nor advisable in this case. The question is a sensitive and, to say the least, troubling one. It implicates not just the life of a single individual, but also the State's powerful and legitimate interest in punishing the guilty, and the nature of state-federal relations. Indeed, as the Court persuasively demonstrates, ante, at 7-26, throughout our history the federal courts have assumed that they should not and could not intervene to prevent an execution so long as the prisoner had been convicted after a constitutionally adequate trial. The prisoner's sole remedy was a pardon or clemency.

113 S.Ct. at 874. (O'Connor, J., concurring).

This case squarely presents the troubling question left open by the Court in Herrera -- when has a prisoner made a truly persuasive showing of innocence that would satisfy a constitutional prohibition against executing an innocent person? Despite the disagreements regarding the strength of Petitioner's evidence of innocence, all the judges below agreed that it presented a case for innocence even stronger than that came before this Court in Herrera v. Collins:

> Lloyd Eugene Schlup has presented truly persuasive evidence that he is actually innocent of the murder of his fellow inmate Arthur "Stump" Dade. Five eyewitnesses to the murder have provided sworn testimony that Schlup neither participated in the murder nor was present at the time. Both Schlup and his mother begged trial counsel (and subsequent counsel) to interview inmates housed in cells near the site of the murder, but none did so. Consequently their testimony was not heard by the jury that convicted Schlup and sentenced him to death. Moreover, their testimony has not been heard in open court since the trial because neither the Missouri courts nor the federal courts have been willing to grant Schlup an evidentiary hearing in which this new evidence could be heard and evaluated.

App. A-13. (Heaney, J., dissenting).

> [T]he district court indicated that Schlup has presented a stronger case than did Herrera in that Schlup's affidavits do not consist of hearsay but of eyewitness testimony, and Herrera was, in the opinion of the district court, "convicted on the basis of a larger quantity of evidence than was presented at [Schlup]'s trial." Schlup v. Delo, No. 4:92CV00443, slip op. at 11 (E.D. Mo. Aug. 23, 1993).

Ibid. at 33.

The judges below assumed that Herrera v. Collins envisioned that, in some circumstance, a showing of innocence could preclude an execution under the Eighth Amendment. See Appendix A at A-11-12. As Chief Judge Arnold wrote:

> As I understand the various opinions in Herrera v. Collins, 113 S.Ct. 853 (1993), a majority of the Court appears to believe that, in a sufficiently strong case, innocence would be a ground for habeas relief,. The case would have to be "truly persuasive" and "extraordinary." We know that these standards were not met in Herrera itself or in Delo v. Blair, 113 S.Ct. 2922 (1993) (per curiam). In Blair, a stay of execution was dissolved on the ground that the evidence of innocence was no more persuasive than that presented in Herrera.
>
> In my view, it is likely that Schlup's evidence of innocence is substantially more persuasive than Herrera's or Blair's. I am not nearly so familiar with the record as the members of the panel, but Judge Heaney's dissent convinces me that there is at least a substantial likelihood that a trier of fact would consider Schlup's evidence sufficiently persuasive to meet the high Herrera standard if an evidentiary hearing were held. To be sure, there are contradictions in both sides' evidence, and I agree with the panel that, even after all of the new evidence is considered, a reasonable jury could still find Schlup guilty. In this sense, the Herrera standard seems easier to meet than the Sawyer standard, which is quite close to that of Jackson v. Virginia, 443 U.S. 307 (1979). In other words, under Herrera, if evidence is newly discovered, a habeas petitioner could obtain relief by making a "truly persuasive" or "extraordinary" case, even if, after

> considering the new evidence, a reasonable jury could still convict him.

The panel majority, however, appeared to equate the Herrera standard with Jackson's--finding its determination of the Sawyer issue dispositive of the separate Eighth Amendment claim.[8] The majority did this by discounting much of Mr. Schlup's new evidence, despite the fact that the witnesses themselves had never been heard or evaluated in any forum.

> Herrera points to the resolution of Schlup's claim. As we have just discussed in part II-A, when the new evidence itself is analyzed with its inconsistencies and weaknesses, and considered together with the evidence before the jury at the trial of the case, the extraordinarily high burden is not met, and there is no truly persuasive demonstration of actual innocence.

Appendix A-12 (emphasis added).

As we have noted above, under the circumstances the "inconsistencies and weaknesses" of the evidence showing Petitioner's innocence are remarkably few. Although the eyewitnesses are prisoners, most are black prisoners with no reason to protect Mr. Schlup, a white man accused of the race-motivated

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[8]One of the Circuit judges--the author of the opinion below--offered an alternative rationale for denial of Mr. Schlup's Herrera claim: Judge Beam stated his own view that

> Mr. Schlup cannot, under the holding in Herrera, seek federal habeas relief based upon this "free standing" claim without first seeking executive clemency from the Governor of Missouri. It is my view that in Herrera, at least five members of the Supreme Court (Chief Justice Rehnquist, Justices O'Connor, Kennedy, Scalia, and Thomas) would permit a federal habeas remedy based upon an "actual innocence" claim arising from newly discovered evidence rather than trial error (assuming such a remedy even exists when the question reserved for future consideration is answered) only "if there were no state avenue open to process such a claim." Herrera, 113 S. Ct. at 869, 874.

killing of a black victim. Many of those prisoners made statements to investigating authorities, shortly after the crime, consistent with what they now say; but none were ever heard by the trial jury. Although some of them denied knowledge at the time, as Judge Heaney noted, their reasons for doing so may be easily understood. See Appendix A-14-15, n.2. More importantly, the testimony of these witnesses is strongly corroborated by the physical evidence, gathered immediately after the murder took place, and in a videotape that, in light of the contemporaneous statements of witnesses, shows Mr. Schlup to have been in another place.

The observation below that Mr. Schlup's case is distinguishable from Herrera because the evidence of his innocence is stronger, while the evidence of his guilt is weaker than that in Herrera, understates the distinction between the facts of these cases. There is not a single criticism that can be made against the case for Mr. Schlup's innocence that does not apply with equal or greater force to the state's case. Although some (but not all) of Mr. Schlup's witnesses are convicted felons, the state's two essential witnesses are subject to similar challenges to their character. One is a three-time felon; the other is a drug addict. As for prior inconsistent statements, the state's case is riddled with them. Although Roger Flowers claims that he broke up the fight, John Maylee, who claims that he saw the whole fight from beginning to end, never saw Flowers at the scene. Before the video-tape was discovered, Flowers said that Mr. Schlup fled toward the locked end of the walk, in the opposite direction from the

dining room, and that Dade was carried out of the housing unit before he took Rodnie Stewart downstairs and notified Captain Eberle of the fight. When the video tape revealed that Mr. Schlup was first in line for lunch, and had been in the dining room for a minute and five seconds before the radio call was sent out, and a minute and a half before Dade was carried out of the housing unit, Flowers changed his story. At trial, he said that he did not see where Mr. Schlup went, and he said that he took Stewart downstairs before Dade was carried out. Trial counsel did not bother to prove that Flowers had ever said anything different. There are many other discrepancies in their testimony.

There is a reasonable explanation for the reluctance of inmates to come forward and snitch while the real perpetrator lived among them. However, the only reasonable explanation for the numerous contradictions in the testimony of John Maylee and Roger Flowers is that Mr. Schlup is wrongly accused of the crime.

Another aspect of this case which sets it apart from Herrera is the role of physical evidence. Every aspect of Mr. Schlup's innocence is corroborated by physical evidence. The video-tape backed up his statement, and the testimony of Bernard Bailey and Arthur St. Peter, that he went straight to lunch that day. The absence of any trace of blood on his clothing corroborates his claim that he was not involved in the stabbing.[9]

[9]At Mr. Schlup's trial, the state tried to downplay the amount of blood at the scene of the crime. At Mr. Stewart's trial, Officer Maylee testified that he vomited for nearly an hour after seeing all the blood.

By contrast, the state's case is remarkable for the absence of corroboration--evidence which, if Mr. Schlup were guilty, the state should be able to produce. The state's refutation of Mr. Schlup's video-taped alibi depended upon the assumption that Captain Eberle was the first officer who reported the stabbing; radio logs maintained by the prison would have recorded the time of the call and the identity of the caller.[10] It is also undisputed that the attackers left the housing unit after most of the inmates had gone to lunch, meaning that Mr. Schlup had to run through the crowd and cut in at the head of the line. There were at least two officers stationed between the housing unit and the scene of the crime, both of whom would have seen him do this. One of these officers is Lt. Faherty, who says that Mr. Schlup was the first prisoner coming out of the housing unit, walking at a leisurely pace. The other officer, Curtis Bittle, likewise saw nothing unusual.[11] Again, the video-tape reveals that Officer Faherty is telling the truth. Mr. Schlup is not nervous, excited, or out of breath.

Although witnesses on both sides are subject to attacks on their character or credibility, the objective physical evidence in

[10]The dissenting judge below noted that "the absence of these logs is but further evidence of the ineffectiveness of Schlup's trial counsel." App. at 22, n. 6. Since trial, the state has resisted all efforts to obtain these logs.

[11]The hallway between the housing unit and the dining room is long and narrow, and it is divided down the middle by a rail, leaving just enough room for prisoners to walk single file on one side of the rail. Inmates are required to remain to the right of the rail; officers use the left side of the hall. Mr. Schlup could not have run to the head of the line and cut in without being seen by any of several officers on duty in that hallway.

this case points only one direction--toward Mr. Schlup's innocence. The only flimsy corroboration the state can muster is a photograph of a small scratch on Mr. Schlup's neck, which during his interrogation he attributed to scratching a pimple.

It is difficult to realistically imagine a more persuasive initial showing of innocence. It is simply not realistically possible that anyone convicted of a capital crime could present evidence which demonstrated their innocence, wholly free from any "inconsistency or weakness". It is inevitable there will be trial evidence that contradicts some aspect of what is presented; and there will always be doubts raised by the simple fact that the witnesses did not come forward earlier.

The categorical rejection of this testimony by the courts below was inconsistent with the general principle that, in habeas cases as others, credibility is generally to be determined by the traditional means of testimony under oath, and cross-examination. See Keeney v. Tamayo-Reyes; Townsend v. Sain, 372 U.S. 293, 312-13 (1963); Ford v. Wainwright, 477 U.S. 399, 410 (1986). Under the usual rules of summary judgment, Mr. Schlup's submissions would have to be considered true until and unless they were found incredible by some finder of fact.

> The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary. Therefore, where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew.

Townsend v. Sain, 372 U.S. 293, 312 (1963).[12] Although there may be justifications for expediting the process of evaluating such claims, when they are brought in the days before a scheduled execution, surely it was not the Court's intent in Herrera that established mechanisms for determining the truth would be abandoned in such circumstances, altogether.

The logic of the Court of Appeals opinion, which would make such flaws fatal to any Eighth Amendment claim, must lead inevitably to a conclusion that no innocent person could ever be convicted of a capital crime and sentenced to death. Unfortunately, we know that is not true:

> One impressive study has concluded that 23 innocent people have been executed in the United States in this century, including one as recently as 1984. Bedau & Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21, 36, 173-179 (1987); M. Radelet, H. Bedau, & C. Putnam, In Spite of Innocence 282-356 (1992). The majority cites this study to show that clemency has been exercised frequently in capital cases when showings of actual innocence have been made. See ante, at 24. But the study also shows that requests for clemency by persons the authors believe were innocent have been refused. See, e. g., Bedau & Radelet, 40 Stan. L. Rev., at 91 (discussing James Adams who was executed in Florida on May 10, 1984); M. Radelet, H. Bedau, & C. Putnam, In Spite of Innocence, at 5-10 (same).

113 S. Ct. at 878, n.1. The processes of capital trials and review, like all human institutions, are not perfect. See McCleskey v. Zant, 481 U.S. 279, 313 (1987). The Court in Herrera recognized that the same is true of clemency:

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[12]A hearing on an otherwise abusive claim can be dispensed with "if the district court determines as a matter of law that petitioner cannot satisfy the standard." McCleskey v. Zant, 499 U.S. 467, 494 (1991) (emphasis added).

> Although we do not doubt that clemency -- like the criminal justice system itself -- is fallible, we note that scholars have taken issue with [the Bedau-Radelet] study. See Comment, Protecting the Innocent: A Response to the Bedau-Radelet Study, 41 Stan. L. Rev. 121 (1988).

113 S.Ct. at 868, n. 15.

Neither, of course, are the perceptions of federal courts reviewing claims of innocence brought to forestall impending executions. But if such claims are to be entertained, at least where they reach the "extraordinary" level of persuading several federal judges that a death-sentenced petitioner is actually innocent of the crime--they should be subjected to the most effective mechanisms for ascertainment of the truth available. Traditionally, that has included live testimony, subject to cross-examination. In a habeas corpus proceeding, "a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts." Townsend v. Sain, 372 U.S. 293, 312-313 (1963). Where, as here, all of the opinions in the courts below are skeptical of the state's witnesses as well as petitioner's, a hearing is essential to the protection of the important constitutional interests at stake. Where the case turns on the credibility of eyewitnesses to the crime, the observations of Justice O'Connor are particularly applicable to the role of the court which must resolve the dispute:

> A hearing permits counsel to probe the [witness'] memory, his reasons for acting as he did, and his understanding of the consequences of his actions. A hearing also permits the trial judge to observe the juror's demeanor under cross-examination and to evaluate his answers in light of the particular circumstances of the case.

Smith v. Phillips, 455 U.S. 209, 221 (1982) (O'Connor, J., concurring).[13] No less is required here where numerous eyewitnesses provide direct testimony of petitioner's innocence, and that testimony is corroborated by physical evidence which includes a video-tape which is, upon review of the totality of the record now available, conclusive proof of Petitioner's defense of alibi.

Mr. Schlup's witnesses have never been put to that test. Unless they are lying, Mr. Schlup was not involved in this crime. Their statements are as consistent as can realistically be expected, with each other and with the indisputable physical and recorded evidence of the circumstances surrounding the crime. It is undisputed that the murder occurred on a crowded cell block before many witnesses. Not one single prisoner, Black or White, has implicated Mr. Schlup in the killing of Arthur Dade. Petitioner submits that any inconsistency in the affidavits of the prisoners is due simply to the variance of statements one would obtain about any event seen by a large number of people. If such a preliminary showing is not enough even to have a court listen to that testimony, and evaluate it individually rather than categorically, it is hard to imagine a case in which the Eighth and Fourteenth Amendments could actually prevent a wrongful execution.

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[13]The witness at issue in Phillips was a juror testifying about her own bias. The legal issue was whether a hearing would yield reliable results, or whether the doctrine of "implied bias" should be applied.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1993

LLOYD EUGENE SCHLUP,

Petitioner,

v.

PAUL DELO,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Schlup v. State, 758 S.W.2d 715 (Mo. banc 1988).....1

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STATEMENT OF THE CASE

Petitioner, Lloyd Eugene Schlup, was convicted, after a change of venue, in the Circuit Court of St. Charles County, Missouri, of capital murder, §565.001, RSMo 1978 (repealed effective October 1, 1984), and was sentenced to death. The conviction and sentence were affirmed on direct appeal. State v. Schlup, 724 S.W.2d 236 (Mo. banc 1987), cert. denied, 482 U.S. 920 (1987).

On July 13, 1987, petitioner filed a post-conviction relief motion pursuant to Missouri Supreme Court Rule 27.26 (repealed January 1, 1988) in the Circuit Court of St. Charles County, Missouri. The circuit court denied petitioner's post-conviction relief motion, and the Missouri Supreme Court affirmed. Schlup v. State, 758 S.W.2d 715 (Mo. banc 1988).

On January 5, 1989, petitioner filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. §2254, in the United States District Court, Eastern District of Missouri. On February 3, 1989, the district court appointed David C. Howard and Caterina DiTraglia to represent petitioner in his habeas corpus proceeding. Counsels filed an amended petition on March 7, 1989. After responsive pleadings, the Honorable William L. Hungate denied petitioner's petition for writ of habeas corpus on November 21, 1989. The district court's denial of petitioner's petition was affirmed by the Eighth Circuit Court of Appeals on July 22, 1991. See Schlup v. Armontrout, 941 F.2d 631 (8th Cir. 1991), cert. denied, 112 S.Ct. 1273 (1992).

After this Court denied petitioner's petition for writ of certiorari, petitioner filed a motion to alter or amend judgment pursuant to Fed.R.Civ.P. 60(b)(6) in the district court. The district court denied petitioner's Rule 60(b)(6) motion. See Schlup v. Armontrout, No. 89-0020-C-3 (E.D.Mo., March 10, 1992) (unpublished opinion).

On March 11, 1992, petitioner filed his third petition for writ of habeas corpus in the United States District Court, Eastern District of Missouri.[1] After responsive pleadings, the district court denied petitioner's petition for writ of habeas corpus. See Schlup v. Delo, No. 4:92CV00443JCH (E.D.Mo., August 23, 1993) (unpublished opinion). The district court's denial of petitioner's petition was affirmed by the Eighth Circuit Court of Appeals. Schlup v. Delo, 11 F.3d 738 (8th Cir. 1993). The Eighth Circuit deemed the case unworthy for rehearing en banc. Id. at 754.

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[1]Petitioner's Rule 60(b)(6) motion constituted a second petition for writ of habeas corpus under Eighth Circuit precedents. See Blair v. Armontrout, 976 F.2d 1130, 1134 (8th Cir. 1992), cert. denied, 113 S.Ct. 2357 (1993) (treating a Rule 60(b) motion as a second petition for writ of habeas corpus); Bolder v. Delo, 983 F.2d 98, 99 (8th Cir. 1992), cert. denied, 113 S.Ct. 1070 (1993) (same).

ARGUMENT

Petitioner presents three questions for review by this Court. Since petitioner fails to demonstrate any conflict between the appellate court opinion and the opinions of this Court or other appellate courts and since petitioner fails to demonstrate a significant issue of federal law that has not been but should be resolved by this Court, the Court should decline to issue a writ of certiorari. Supreme Court Rule 10.1

In petitioner's third petition for writ of habeas corpus, petitioner presented abusive, successive and defaulted grounds for relief that challenge the lawfulness of the guilt phase of his bifurcated trial. To overcome these defenses, petitioner alleged he was "probably actually innocent."

I.

Petitioner's first question presented for review to this Court is whether the definition of "probable actual innocence" in Sawyer v. Whitley, 112 S.Ct. 2514 (1992) applies to abusive, successive and defaulted guilt phase issues. The Eighth Circuit Court of Appeals properly applied the Sawyer definition of "probable actual innocence". The Court of Appeals did not apply a new standard for guilt phase issues, but merely noted that the "colorable claim of factual innocence" standard of Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) was "more clearly delineated by the Supreme Court in Sawyer". Schlup v. Delo, 11 F.3d 738, 740 (8th Cir. 1993).

In Sawyer, this Court made it clear that the cause and actual prejudice test or the "probable actual innocence" test must

be met before a federal habeas corpus court can review the merits of a successive, abusive or defaulted claim. Sawyer v. Whitley, 112 S.Ct. at 2518. This Court discussed the "probable actual innocence" standard without distinction between guilt and penalty phase issues. Id. at 2518-2519. The Court even discussed the ease of applying the "probable actual innocence" concept in a guilt phase context. Id. at 2519-20. The court applied the "probable actual innocence" exception in Mr. Sawyer's case and found his allegation lacking as to both guilt and penalty phases. Id. at 2523-24. Indeed, the lack of distinction between guilt and penalty phase issues is understandable since this Court intends for the standards for federal habeas review to be applied consistently without distinction between abusive, successive, defaulted, or evidentiary-defaulted claims. Keeney v. Tamayo-Reyes, 112 S.Ct. 1715, 1720 (1992).

Although petitioner argues that Kuhlmann allows for a lower standard of proof to establish probable actual innocence of the underlying conviction then the Sawyer "probable actual innocence" of penalty phase issues, petitioner offers no policy reasons why guilt and penalty phase claims should be treated differently. Furthermore, the Kuhlmann standard can be applied consistently with the holding in Sawyer. See Sawyer v. Whitley, 112 S.Ct. at 2589 (discussing innocence standards).

Petitioner also contends that there is a split between the Eighth Circuit and the Fifth and Ninth Circuits on this issue. See Montoya v. Collins, 988 F.2d 11, 13 (5th Cir.), cert. denied, 113 S.Ct. 1630 (1993); Kirkpatrick v. Whitley, 992 F.2d

491 (5th Cir. 1993); Campbell v. Blodgett, 982 F.2d 1321, 1333 (9th Cir. 1992) (Petition at 15). Both Fifth and Ninth Circuit's opinion contained dicta and neither relied upon a distinction between the Kuhlmann and Sawyer language as a basis for granting or denying relief. Thus, petitioner fails to establish that there is a need to resolve an inter-circuit conflict. Supreme Court Rule 10.1.

Since the Court of Appeals' application of Sawyer to the underlying conviction was proper, petitioner's petition for writ of certiorari on this issue should be denied.

II.

Petitioner's second question presented for review is if Sawyer v. Whitley, 112 S.Ct. 2514 (1992) does define the "probable actual innocence" exception to review of defaulted, abusive and successive claims, does petitioner have to establish that the evidence of guilt presented at trial was constitutionally insufficient. Petitioner contends that if a habeas petitioner must establish that no rational trier of fact could have found the essential elements beyond a reasonable doubt, Jackson v. Virginia, 443 U.S. 307, 319 (1979), then no petitioner could ever establish probable actual innocence in a case, such as petitioner's, where the evidence of actual innocence merely impeaches the evidence presented at trial.

This issue is vital to petitioner's case where the petitioner does not present newly discovered evidence of actual innocence in his petition for writ of habeas corpus, but rather presents newly developed evidence of actual innocence consisting of affidavits from inmates who previously told investigators that they did not observe the murder. Since the state presented two eyewitnesses to the murder, the evidentiary sufficiency standard of Jackson has been met.

The panel opinion neither cites to, or relies on, Jackson in determining the issue.[2] Therefore, this is a false question

[2]Only the dissent from the denial of rehearing en banc cites Jackson. Schlup v. Delo, 11 F.3d 738, 755 (8th Cir. 1993).

for review since the panel opinion does not rely on Jackson in determining that petitioner failed to establish the "probable actual innocence" exception to review his defaulted, abusive and successive claims. Rather, the panel opinion applied Sawyer and looked at all the evidence presented before finding that petitioner did not meet the Sawyer standard.

Although the panel reviewed all the evidence in support of petitioner's claim of probable actual innocence, this Court rejected the presentation of additional mitigating evidence to establish "probable actual innocence" holding that such a broad inquiry would "make it anything but a 'narrow' exception". Sawyer v. Whitley, supra, 112 S.Ct. at 2522. Throughout the Sawyer opinion, this Court emphasized the narrowness of the exception. See id. at 2519, citing, Dugger v. Adams 489 U.S. 401 (1989) and McCleskey v. Zant, 111 S.Ct. 1454 (1991).

Because the panel's opinion did not rely on the Jackson, standard in determining that petitioner failed to establish the "probable actual innocence" exception to review his defaulted, abusive and successive claims, the question of whether petitioner must establish that the evidence of guilt presented at trial was constitutionally insufficient is not ripe for review by this Court. See Herrera v. Collins, 113 S.Ct. 853, 871 (1993) (O'Connor, J., concurring).

III.

Petitioner's third question presented for review is whether substantive due process of law requires the district court to grant an evidentiary hearing when a petitioner tenders newly discovered evidence of actual innocence to the court.[3]

Petitioner contends that an evidentiary hearing is required in the district court when a petitioner tenders a claim of newly discovered evidence of actual innocence. In Townsend v. Sain, 372 U.S. 293 (1963), this Court held that whether to hold an evidentiary hearing is left to the sound discretion of the district court. Id. at 313. In providing guidance to the courts, this court discussed six situations in which an evidentiary hearing in the district court would be required. Id. Although one of the situations requiring an evidentiary hearing was "a substantial allegation of newly discovered evidence" Id., this court noted that "[o]f course, such evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." Id. at 317.

This holding was reaffirmed in Herrera v. Collins, 113 U.S. 853 (1993), which held that claims of actual innocence is not in

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[3]This Court noted that in the context of a Fourteenth Amendment claim, the question is not whether due process prohibits the execution of an innocent person, but whether due process entitles petitioner to judicial review of his actual innocence claim. Herrera v. Collins, 113 S.Ct. 853, 864, n. 6 (1993).

and of itself a constitutional claim but merely a gateway through which petitioner must pass to have his otherwise procedurally barred constitutional claim reviewed on the merits. Id. at 862. A petitioner who "does not seek excusal of a procedural error" is not entitled to habeas relief based on a claim of actual innocence. Id.[4] Any holding to the contrary would be barred under the implications of Teague v. Lane, 489 U.S. 288 (1989). Furthermore, this court held that the district court is not obligated to grant a hearing when the newly discovered evidence is frivolous or incredible. Townsend v. Sain, 372 U.S. at 317.

Petitioner has not shown that the district court abused its discretion in denying him an evidentiary hearing on his newly discovered evidence of actual innocence. Both the district court and the court of appeals addressed petitioner's allegation of newly discovered evidence of actual innocence. Both found that the affidavits submitted almost ten years after the murder consistent of statements inconsistent with previously sworn testimony given by the same witnesses and that witnesses in some cases were inconsistent with each other. This Court should defer to the careful review of petitioner's claim of actual inno-

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[4]Although petitioner contends that Herrera allowed for review of a truly persuasive claim of actual innocence, the Court's discussion on this issue was mere dicta. Furthermore, the court held that such a claim would only be reviewable if there was no state avenue in which to present the evidence of actual innocence. Id. 113 S.Ct. at 869. Petitioner admits that not only is a request for clemency available, but also that the Governor has stayed his execution and formed a Board of Inquiry to review his claim.

cence by the Court of Appeals; see Guinan v. Delo, 114 S.Ct. 296 (1993) (Ginsberg, J., concurring), and by the district court, see Delo v. Blair, 113 S.Ct. 2922, 2933 (1993). As this Court correctly noted in Herrera, the passage of time "only diminishes the reliability of criminal adjudication." Herrera v. Collins, 113 S.Ct. at 862.

As both the district court and the court of appeals noted, the testimony of the two eye witnesses has never been refuted. Nor has petitioner demonstrated that he has a justifiable reason for not previously presenting this information. Given that the affidavits submitted to the district court and to the court of appeals are contradictory to the affiant's previous statements and testimony, petitioner cannot demonstrate a justifiable reason for their eleventh hour presentation. Townsend v. Sain, 372 U.S. at 317. Since the district court was able to determine that the newly discovered evidence of actual innocence was not credible, the district court was not obligated to grant petitioner an evidentiary hearing on this matter. Id. Thus, petitioner's third question presented for review should be denied.

CONCLUSION

In view of the foregoing, respondent submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court, and that three true and correct copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari in the case of Lloyd Eugene Schlup v. Paul Delo, No. 93-7901, was mailed pursuant to Supreme Court Rule 29.3, postage prepaid, this 4 day of March, 1994, to:

Sean O'Brien
5319 Rockhill
Kansas City, MO 64110

FRANK A. JUNG

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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D. Appellant's Factual Brief in Support of Innocence, Exhibit 1 to Application for Stay of Execution, U.S. No. 93-A-427.

E. Affidavit of former corrections officer Robert Faherty.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 93-3272

Lloyd E. Schlup, *
*
Appellant, *
* Appeal from the United States
v. * District Court for the Eastern
* District of Missouri.
Paul K. Delo, *
*
Appellee. *

Submitted: November 3, 1993

Filed: November 15, 1993

Before JOHN R. GIBSON, Circuit Judge, HEANEY, Senior Circuit Judge, and BEAM, Circuit Judge.

BEAM, Circuit Judge.

Lloyd Eugene Schlup, a Missouri death-row inmate, requests a stay of execution and reversal of the district court's judgment denying his second petition for a writ of habeas corpus under 28 U.S.C. § 2254. The district court[1] dismissed Mr. Schlup's second petition on August 23, 1993, and denied his subsequent Fed. R. Civ. P. 59(e) motion to set aside the dismissal order. The district court's final ruling came on September 13, 1993, and Mr. Schlup's appeal and motion for a stay of execution pending the resolution of his appeal followed.

The district court dissolved its stay of execution on September 15, 1993, in conjunction with its final rulings on the second petition. After a hearing, we denied the motion for stay pending appeal. Schlup v. Delo, No. 93-3272, 1993 U.S. App. LEXIS 26748 (8th Cir. Oct. 15, 1993). We now vacate that opinion and consider a renewed request for stay and the merits of Mr. Schlup's appeal.

[1]The Honorable Jean C. Hamilton, United States District Judge for the Eastern District of Missouri.

In support of his second petition for habeas relief, this appeal, and the renewed request for stay of execution, Mr. Schlup tendered to the district court and now tenders to this court several affidavits and statements, mostly from present or former prisoners, purporting to be newly discovered evidence tending to establish that he was not present at the scene of the murder for which he was sentenced to death. He also renews his reliance on a videotape, offered at trial as part of an alibi defense, showing his presence in the dining room near the time of the murder. In other words, appellant says he could not have been present at the assault and is actually innocent of the crime.

I.

In his second petition, Mr. Schlup asserts a number of constitutional claims not raised, or raised and denied in his first petition. Thus, these allegations constitute either successive or abusive uses of the writ, 28 U.S.C. § 2244(b), and may be considered by this court only under limited circumstances. Sawyer v. Whitley, 112 S. Ct. 2514, 2518 (1992).

> Unless a habeas petitioner shows cause and prejudice, see Wainwright v. Sykes, 433 U.S. 72, (1977), a court may not reach the merits of: (a) successive claims which raise grounds identical to grounds heard and decided on the merits in a previous petition, Kuhlmann v. Wilson, 477 U.S. 436 (1986); (b) new claims, not previously raised which constitute an abuse of the writ, McCleskey v. Zant, 499 U.S. ___ (1991); or (c) procedurally defaulted claims in which the petitioner failed to follow applicable state procedural rules in raising the claims. Murray v. Carrier, 477 U.S. 478 (1986). These cases are premised on our concerns for the finality of state judgments of conviction, and the

"significant costs of federal habeas review." McCleskey, supra, at ___; see, e.g., Engle v. Isaac, 456 U.S. 107, 126-128 (1982).

Id. (parallel citations omitted).

Mr. Schlup seeks to establish "cause and prejudice" or, in the alternative, seeks to establish his "actual innocence" of the crime as a means of obtaining federal court review of his constitutional claims. The district court reviewed and denied his cause and prejudice allegations. We agree with this result and adopt the well-reasoned opinion of the district court in this regard.

II.

A. Procedural Bar

Under a second federal habeas review of a petitioner's state court conviction, a claim of actual innocence requires a dual analysis. First, we must consider Mr. Schlup's attempt to invoke the rule announced in Kuhlmann v. Wilson, 477 U.S. 436 (1986) that even if a petitioner cannot meet the cause and prejudice standard, a federal court may examine the merits of a constitutional claim if failure to do so would result in a miscarriage of justice. Id. at 454. A petitioner "may make the requisite showing by establishing that . . . he has a colorable claim of factual innocence." Id. The contours of this qualification were more clearly delineated by the Supreme Court in Sawyer v. Whitley, which referred to the test as the miscarriage of justice or "actual innocence" exception. Sawyer, 112 S. Ct. at 2519.

In this context, actual innocence is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Herrera v. Collins, 113 U.S. 853,

862 (1993). Thus, the question is: Has this appellant established "actual innocence" as defined by the Supreme Court? We think not, at least under the test this panel must apply.

Sawyer dealt with the punishment phase of the criminal proceeding as opposed to the guilt or innocence phase of the trial. Therefore, appellant argues, with some justification, that Sawyer announced only a test for analyzing the fairness of the death penalty portion of a trial. And, the Supreme Court did say, in Sawyer, with regard to guilt or innocence:

> Our standard for determining actual innocence was articulated in Kuhlmann as: "[T]he prisoner must 'show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.'"

Sawyer, 112 S. Ct. at 2519, n.5 (citations omitted).

On the other hand, Sawyer says that "actual innocence" under the death penalty phase of a case must be determined by considering whether a "petitioner has shown by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty." Id. at 2523. Says appellant, this seemingly higher (penalty) test is necessary because the amorphous concept of being actually "innocent of death" requires a more objective standard. Id. at 2519-20. In other words, in the context of guilt or innocence of the crime itself, the concept of "actual innocence" is easier to grasp. Id. at 2520. Thus, the more subjective Kuhlmann test is sufficient.

Whatever the merits of appellant's contentions, we do not write on a clean slate. We must reject appellant's argument

because in this circuit "the new standard [required by Sawyer] applies equally to challenges to a conviction, not just challenges to a death sentence." McCoy v. Lockhart, 969 F.2d 649, 651 (8th Cir. 1992). And, the imprimatur of this court en banc was stamped on the McCoy holding in Cornell v. Nix, 976 F.2d 376 (8th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1820 (1993). Accordingly, we make our determination of whether Mr. Schlup's claim of actual innocence opens the gateway to our consideration of his constitutional claims on that basis.

Before reviewing the gateway evidence now advanced by Mr. Schlup, we consider the presence or absence of any constitutional error at the trial for which relief could be granted. The dissent contends that there was constitutional error in the form of "utter ineffectiveness of Schlup's trial counsel" and that but for this error "the jury would have received the full picture of Dade's murder, and if it were to credit the evidence, it would have no choice but to acquit." The dissent barely mentions that, although the district court found the claim of ineffective assistance to be procedurally barred, we disregarded this holding and considered the merits of this ineffective assistance claim in the appeal of Mr. Schlup's first petition for habeas relief. Schlup v. Armontrout, 941 F.2d 631, 638-42 (8th Cir. 1991), cert. denied, 112 S. Ct. 1273 (1992). We found that under the test announced in Strickland v. Washington, 466 U.S. 668, 687 (1984), Mr. Schlup's counsel was not ineffective at either the guilt or penalty stages of the state trial proceeding. Schlup, 941 F.2d at 639. We see no reason to change this result even if we consider the evidence Schlup now presents.

As at the first habeas, Mr. Schlup faults his counsel, Mr. Bushmann, for failing to sufficiently investigate the facts surrounding the murder of Arthur Dade. The dissent agrees. This allegation is erroneous and unfair.

There were three inmates involved in the murder. The three lawyers representing the accused worked together on parts of their investigations. Mr. Bushmann spearheaded the discovery and defense preparation. He arranged and participated in the taking of thirty-eight depositions including those of every guilt witness who testified at trial and who was directly related to the prison. It was Mr. Bushmann's persistence that confirmed the existence of the dining room videotape now used by Mr. Schlup in his effort to show actual innocence. Mr. Bushmann also determined through discovery that one hundred persons were interviewed by prison investigators and appears to have obtained, for review, the tapes or transcripts of all the statements resulting from these inquiries. The trials of the other inmates occurred prior to Mr. Schlup's trial and Mr. Bushmann claims to have reviewed the crucial portions of this trial testimony in preparation for Mr. Schlup's defense. The problem does not seem to be deficiencies in trial preparation by Mr. Bushmann but, rather, the changing nature of the information presented by some of the individuals present at or near the deadly assault.

At trial, as noted by the district court, two prison officials, who were eyewitnesses to the crime, positively identified Mr. Schlup as one of the three perpetrators of the murder. This evidence was clearly admissible and stands unrefuted except to the extent that Mr. Schlup now questions its credibility. Witnesses' credibility, however, is an issue reserved for the trial jury. It is not a matter within the province of the district court or of this court in a habeas proceeding. Federal habeas, as explained in Herrera, does not provide a forum for the retrial of a convicted felon. Herrera v. Collins, 113 S. Ct. 853, 860-61 (1993). So, even if we disregard the source of the new evidence, the eleventh-hour nature of the information, and a presentation coming almost six years after the trial; it is simply not possible to say that the appellant has shown by clear and convincing evidence that but for a constitutional error no reasonable jury

would have found him guilty. Therefore, there is no basis for sustaining the motion for stay, Delo v. Blair, 113 S. Ct. 2922 (1993), or for reversing the district court.

Even so, we will discuss the "newly discovered" evidence presented by Mr. Schlup. This information comes in the form of written statements, affidavits, and a timed analysis of the videotape taken in the dining room. We have now heard oral argument on these matters twice.

The major thrust of Mr. Schlup's purported showing of actual innocence involves his alibi defense. Through use of the videotape, timed on a second-by-second basis, Mr. Schlup claims that he could not have been at the murder scene. He was, he claims, in the dining room at the time.

Mr. Schlup primarily relies upon two affidavits, one from a former prisoner and one from a former employee at the institution.[2] The latter document is dated October 26, 1993, eight days before we heard oral argument on the merits of this appeal.

John L. Green, an inmate at the Missouri Prison in Jefferson City at the time of the murder, in an affidavit dated September 7, 1993, states that he was "standing near Sergeant Flowers" at the lever box that opens the cells to unit 5A and from such position saw the murder. He further says that Sergeant Flowers directed him to call "base" to report the fight and that he immediately went into the office and made the call.

In conjunction with this new information, the affidavit of Robert Faherty, a former lieutenant at the prison, is presented.

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[2]At oral argument, the state contended that the employee was discharged. The petitioner claims he retired. We find nothing in the record either way.

He places Mr. Schlup in his presence in a corridor to the dining hall for a two and a half to three-minute period as Mr. Schlup proceeded from housing unit 5A, the location of the murder, to the dining hall.

The videotape is then presented to show Mr. Schlup arriving at the dining hall first in line. According to the videotape, the corrections officers depart from the hall one minute and five seconds later, purportedly as a result of a call from "base" reporting the assault. This, Mr. Schlup contends, shows that he had left the housing unit before the assault occurred. Since Mr. Schlup arrived, according to Mr. Faherty's calculation, at least three and a half to four minutes after leaving the housing unit, and, the assault occurred, according to Mr. Green's statement and the videotape, one and a half to two minutes prior to his arrival at the dining room, Mr. Schlup has an alibi. This was the same defense Mr. Bushmann attempted to establish at trial.

However, Mr. Green has made two prior statements. He told prison investigators that on February 3, 1984, the day of the murder, he was in the office at the housing unit, not next to Sergeant Flowers at the lever box some distance away, and that he did not observe the murder at all. He did state that he called "base" for help but on a different timing sequence. Of more importance is Mr. Green's testimony under oath at the Rodnie Stewart trial. Mr. Stewart was accused, along with Mr. Schlup and Mr. O'Neal, of the crime and was tried over a year prior to Mr. Schlup. On September 5, 1984, Mr. Green testified under oath that he was in the office, heard the words "fight-fight," "got up and . . . went to the door [of the office]," could see Sergeant Flowers at the lever box, saw Dade running toward the office when Dade and Stewart collided and fell to the floor. Mr. Green said he saw no actual fight take place. He then testified that he went into the office to wait for further instructions. He made no mention in his testimony of calling "base." Thus, neither of these earlier

presentations fully support Mr. Green's present statement. Indeed, there are crucial differences.

Also, Mr. Faherty has testified under oath on two prior occasions. His deposition was taken by Mr. Bushmann and the lawyers for Mr. O'Neal and Mr. Stewart on June 29, 1984, and he testified at Mr. Schlup's December 1985 trial. In both instances, Mr. Faherty has Mr. Schlup yelling out a window near the corridor to the dining room and then passing with the "first wave" of prisoners immediately into the dining room. Specifically, Mr. Faherty testified that he was temporarily on post at door T-3 located at the end of the corridor leading from the housing unit to the dining hall for only ten to fifteen seconds. At this location and during this time period, he saw Mr. Schlup yell out the window and told Mr. Schlup to move along toward the dining room which "he [Schlup] did." Mr. Faherty testified that he also immediately moved to the dining room after his ten to fifteen second stop at T-3 because the dining room was really his assigned post. By all accounts, the walking time from T-3 to the entrance of the dining room is no more than twenty-five to thirty seconds.

Also of importance, in this context, is the testimony of Sergeant Peoples who was manning "base" during the relevant time period. He testified without equivocation that it was Captain Eberle, one of the officers posted near the scene of the murder, and not prisoner Green, who called "base" with news of the stabbing. Peoples testified that he immediately broadcast an alarm to prison officers, including those in the dining room who are seen responding to the call on the videotape.

Thus, in the record and in the discovery, a much different timing sequence is established, one that provided Mr. Schlup ample time to participate in the murder and make his way to the dining hall. This was, of course, the state's theory at the trial and a theory compatible with the jury verdict.

With the recent Faherty statement, we are asked on appeal to consider evidence that the district court did not have an opportunity to pass upon. Further, Mr. Faherty testified in Mr. Schlup's trial, as indicated, so it cannot be said that his affidavit is newly discovered evidence as were the affidavits considered in Herrera. We must also observe that in a civil context dealing with a motion for summary judgment, we have held that we will not allow an affidavit in conflict with earlier sworn testimony to create an issue of fact. Camfield Tires, Inc. v. Michelin Tire Corp., 719 F.2d 1361 (8th Cir. 1983). We believe that the same rule should apply in the context of habeas litigation, a civil action.

While it is evident that there are some inconsistencies between Mr. Faherty's affidavit and his trial testimony, for the most part, the affidavit simply is an effort to embellish and expand upon his testimony given under oath in Mr. Schlup's trial. This is not the type of newly discovered evidence contemplated in Herrera, and presents an entirely different issue of whether some seven years after a trial the court should permit witnesses to come in and add to, modify, or embellish their earlier testimony. We believe that a habeas court should not permit retrial on such a basis.

The dissent also emphasizes other parts of Mr. Schlup's present version of the facts in its attempt to advance the probability that, but for his attorney's incompetence, no reasonable jury would have found Mr. Schlup guilty of the murder. Mr. Schlup purports to present eyewitnesses who either didn't see him at the assault or who now implicate another inmate, Randy Jordan.

The dissent picks and chooses from among Mr. Schlup's several new statements and affidavits, see dissent n.1, and finds some of them incredible because they "are too inconsistent with" the

statements from some of the other newly presented eyewitnesses. The dissent also ignores or minimizes and excuses contrary statements given by some of these same individuals when the crime was investigated prior to trial. Indeed, three of the new statements credited by the dissent, in addition to the Green affidavit, those by Lamont Griffin-Bey, Donnell White and James Pierce, are inconsistent with prior interviews given during the investigation of the crime. At that time, White and Pierce denied having witnessed the murder at all. As the dissent concedes, Griffin-Bey, who now identifies Robert O'Neal and Rodnie Stewart and finds Mr. Schlup absent from the attack, stated at the time of the contemporaneous investigation that he didn't "know none of those dudes." And, later, he refused to further comment on what happened at the time of the murder.

Thus, Mr. Schlup, like Herrera, attempts to seek a federal court retrial of his state court prosecution and falls well short of showing "by clear and convincing evidence [that] no reasonable juror would find him [guilty of murder.]" Sawyer, 112 S. Ct. at 2523.

B. Due Process

The second prong of Mr. Schlup's "actual innocence" allegation requires our consideration of the claim as, itself, a constitutional violation. This requirement arises from the assumption by the Supreme Court in Herrera made for the sake of deciding that particular case, "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." Herrera, 113 S. Ct. at 869. This language is from Justice Rehnquist's opinion concurred in by Justices Scalia and Thomas. Justice O'Connor in her concurrence, joined by Justice Kennedy, compared and contrasted this language with that from

Justice White's concurrence and Justice Blackmun's dissent, and stated that resolution of this issue assumed by Justice Rehnquist was neither necessary nor advisable in this case. She emphasized that such "federal proceedings and relief--if they are to be had at all--are reserved for 'extraordinarily high' and 'truly persuasive demonstrations of "actual innocence"' that cannot be presented to state authorities." Id. at 874.[3] The decisive issue in her concurrence as well as in Justice Rehnquist's opinion, was that the petitioner had failed to make a persuasive showing of actual innocence. Justice Rehnquist stated that the showing fell short of that which would have to be made to trigger the constitutional claim which he assumed existed.

Herrera points to the resolution of Schlup's claim. As we have just discussed in part II-A, when the new evidence itself is analyzed with its inconsistencies and weaknesses, and considered together with the evidence before the jury at the trial of the case, the extraordinarily high burden is not met, and there is no truly persuasive demonstration of actual innocence.

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[3]As the author of this opinion for the court, I express, separately, without the concurrence of Judge John R. Gibson, my belief that Mr. Schlup cannot, under the holding in Herrera, seek federal habeas relief based upon this "free standing" claim without first seeking executive clemency from the Governor of Missouri. It is my view that in Herrera, at least five members of the Supreme Court (Chief Justice Rehnquist, Justices O'Connor, Kennedy, Scalia, and Thomas) would permit a federal habeas remedy based upon an "actual innocence" claim arising from newly discovered evidence rather than trial error (assuming such a remedy even exists when the question reserved for future consideration is answered) only "if there were no state avenue open to process such a claim." Herrera, 113 S. Ct. at 869, 874. While Schlup argues that the word "process" included in the Herrera formulation by the five member majority means a state court proceeding, such an interpretation is untenable given the extensive discussion of executive clemency in both the opinion of the Court authored by Chief Justice Rehnquist and the concurrence written by Justice O'Connor. Indeed, Justice O'Connor, in her discussion of the "assume[d]" constitutional right, points out that the reserved question "may never require resolution at all" if "the safeguards of clemency and pardon fulfill their historical mission." Id. at 874.

III.

For the reasons stated above, we conclude that the motion for stay of execution should be denied and the order of the district court affirmed.

HEANEY, Senior Circuit Judge, dissenting.

Lloyd Eugene Schlup has presented truly persuasive evidence that he is actually innocent of the murder of his fellow inmate Arthur "Stump" Dade. Five eyewitnesses to the murder have provided sworn testimony that Schlup neither participated in the murder nor was present at the time. Both Schlup and his mother begged trial counsel (and subsequent counsel) to interview inmates housed in cells near the site of the murder, but none did so. Consequently their testimony was not heard by the jury that convicted Schlup and sentenced him to death. Moreover, their testimony has not been heard in open court since the trial because neither the Missouri courts nor the federal courts have been willing to grant Schlup an evidentiary hearing in which this new evidence could be heard and evaluated. This truly persuasive evidence of his innocence allows Schlup to clear the court-imposed procedural hurdles and to address the merits of his claim that trial counsel was ineffective for failing to interview these eyewitnesses. The court errs today in not remanding this matter for an evidentiary hearing, as it did in ruling on Schlup's first petition, and I must therefore dissent.

I

Schlup presents new evidence of his actual innocence of Dade's murder that is truly persuasive. The new evidence falls primarily into two categories. First, and most important, are the affidavits of eyewitnesses to Dade's murder which state unequivocally that Schlup was not present at and did not participate in Dade's murder. Second, Schlup presents new evidence that substantiates his

videotaped alibi, i.e., that he was in the dining room at the time of the murder.

A

Schlup presents five affidavits of eyewitnesses to the murder, none of whom were contacted by Schlup's defense counsel, none of whom testified at trial, and all of whom appear willing to give their testimony in open court.[1] These witnesses describe firsthand the murder of "Stump" Dade, indicating unequivocally that Lloyd Schlup was not a perpetrator and was not even present. This testimony not only satisfies the threshold question of "actual innocence" but persuasively demonstrates the utter ineffectiveness of Schlup's trial counsel in failing to investigate the circumstances of Dade's murder.

John Green testifies by affidavit that while standing outside the unit clerk's office the morning of February 3, 1984, he witnessed Dade's murder:

> I looked down one walk, and I saw Randy Jordan holding Arthur Dade. Jordan was standing behind Dade, and had Dade's arms pinned to his sides from behind. I saw Robert O'Neal stab Dade several times in the chest while Jordan was holding him.
>
> * * *
>
> I never saw Lloyd Schlup at the scene of the crime. . . .
>
> * * *

[1]A number of other persons who stated that they were eyewitnesses to Dade's murder submitted affidavits or sworn testimony indicating that Schlup was not present at the time the murder occurred. I have not placed significant reliance on these statements either because the affiants indicate an unwillingness to testify at an evidentiary hearing or because the statements are too inconsistent with the statements of all of the other eyewitnesses (those newly presented by Schlup and those of the prosecution).

> If I had been contacted before Schlup's trial, I would have told his attorney that he was not there when Dade was stabbed . . . .

Affidavit of John L. Green, at 2, 4, 6 (Sept. 7, 1993). O'Neal has been convicted for his role in Dade's murder, as has Rodnie Stewart, whom Green also saw on "one walk" at the time. Green has been out of prison since 1986, so contrary to the state's assertion he does have something to lose by perjuring himself. He nonetheless comes forward with persuasive evidence of Schlup's innocence, evidence never heard by the jury that sentenced Schlup to death, and he deserves to be heard in open court.[2]

Donnell White was walking to the dining room "very close to" "Stump" Dade when "three white guys" came from the opposite direction:

> One of them had a tumbler of something that he threw in Stump's face. One or two of the other ones started sticking Stump with an ice-pick-type knife. They both jumped him, but I could tell for sure that one guy was stabbing him, and I'm not sure about the other guy. One broke off to the kitchen, and the other threw the knife out the window. The guy who threw the liquid in his face just backed off. The liquid was steaming, and I could smell bleach, so I think it was a mixture of bleach and boiling water. . . . I have seen Lloyd Schlup, and I know who he is. He is definitely not one of the guys I saw jump Arthur Dade, who I knew as "Stump." I know that one of the three men involved has never been prosecuted, and I know that Lloyd Schlup is innocent.

[2]The state argues that Green's latest affidavit is inconsistent with his testimony in the trial of Rodnie Stewart. Green then indicated that he had not seen the stabbing itself. While this inconsistency would need to be explored on remand, I believe it is fairly easily explained. Green was at that time still in prison and justifiably afraid for his well-being. See infra n.11. It was probably in his interest to say that he had arrived just after the stabbing as he then indicated. Now that he has been out of prison for seven years, he no longer is afraid to let the truth be known.

Affidavit of Donnell D. White, at 2, 3 (Apr. 21, 1993) (emphasis added). White describes "the third guy" as "a white guy with tatoos [sic] all over his arms." Id. at 2. Lieutenant Faherty indicates that Randy Jordan was "covered" with tattoos. Affidavit of Robert Faherty, at ¶ 7 (Oct. 26, 1993). White's testimony is otherwise consistent with that of the prosecution: Rodnie Stewart was convicted for his role in Dade's murder, which consisted at least in part of throwing a cup of liquid in Dade's face. See State v. Stewart, 714 S.W.2d 724, 725-26 (Mo. Ct. App. 1986).

Joseph Beck also attests to Schlup's innocence: "I witnessed the knifing of Arthur 'Stump' Dade. It happened immediately in front of my cell, 3-3½ feet away. Lloyd Schlup was not in sight, not even on the flag, where stabbing took place. Never saw Schlup." Affidavit of Joseph N. Beck (Feb. 5, 1992).

James Pierce was waiting for his friend Wardell Harvey to accompany him to lunch when he witnessed Dade's murder: "I saw two white guys go onto 1-walk. One of them threw a cup of liquid in Arthur Dade's face, and the other one stabbed him. Lloyd Schlup was not involved in the stabbing." Affidavit of James Pierce, at 1 (Apr. 21, 1993). Dade was a black man, and his murder may have been racially motivated. Those involved were alleged to be members of a white supremacist group in the prison. Pierce is also black and adds the following: "I have no reason to lie for a white guy. . . . I know for certain that Lloyd Schlup did not kill Arthur Dade, and that he was not even present when Dade was killed." Id. at 2.

LaMont Griffin-Bey was also on his way to lunch when he witnessed Dade's murder: "The first thing I saw of the fight was Rodney Stewart throw liquid in Arthur Dade's face, and O'Neal stab him. . . . Lloyd Schlup was not present at the scene of the fight." Affidavit of LaMont Griffin-Bey, at 2-3 (Apr. 7, 1993). Griffin-Bey made contemporaneous statements consistent with this

affidavit. He told prison investigators that he "saw one man throw some water in his face. And when he went down the other man started hitting him with a knife." Excerpt of Transcript of Inmate Interviews, Exhibit 1A in Support of Petition for Writ of Habeas Corpus (interview of LaMont Griffin-Bey).

Although he failed at that time to identify either of Dade's assailants (stating initially that he "don't know none of those dudes" and later stating an unwillingness to comment on that because "this is too serious for me"), Griffin-Bey did indicate that of the two, "Sgt. Flowers grabbed one" and the other got away. Id. It is uncontroverted that Sergeant Flowers detained Stewart at the scene of the murder and that O'Neal ran to the dining room. An earlier affidavit by Griffin-Bey also supports his most recent statement: "I witnessed the knifing of Arthur Dade on [February 3, 1984]. I saw two men and the victim involved in the knifing. I did not see Lloyd Schlup around the area and I was standing approximately 10 ft. away from where the incident happened." Affidavit of LaMont Griffin-Bey (Jan. 21, 1992).

Each of these five eyewitnesses[3] was available to be

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[3]One additional eyewitness merits mention. According to the transcript of the inmate interviews conducted by prison investigator George Brooks, inmate Ricky McCoy asserted both that there was a "crowd of people" (indicating a generous supply of eyewitnesses to be interviewed by Schlup's trial counsel) and that "[t]here was just only two [perpetrators]. No doubt about it." He then identifies "Neal" as the man who stabbed Dade and a photo of Stewart as the man who threw the cup of water. Excerpt of Transcript of Inmate Interviews, Exhibit 2 in Support of Petition for Writ of Habeas Corpus (interview of Ricky McCoy).

The panel opinion denying Schlup's initial appeal states that although Schlup's trial counsel reviewed the statements made by Griffin-Bey and McCoy, he decided that their "testimony would be repetitive of the testimony to be presented at trial." Schlup, 941 F.2d at 639. Given that trial counsel presented no eyewitnesses to the murder, it eludes me how their testimony could reasonably be considered repetitive.

interviewed by trial counsel had he simply noticed their depositions while he was at the prison to depose those on the prosecution's list, yet this was not done. The district court determined it was unnecessary to hear these witnesses in open court, apparently because there is "something suspect about affidavits produced after a long delay" and the "affiants are all fellow inmates who do not necessarily have a strong incentive to refrain from perjuring themselves." Schlup v. Delo, No. 4:92CV00443, slip op. at 12 (E.D. Mo. Aug. 23, 1993). Of course, not all the affiants are currently fellow prisoners, as noted above,[4] but the district court's reasoning is unpersuasive in any event, given the facts of this case. The murder for which Schlup has been convicted occurred in prison. It follows that the eyewitnesses (other than the prison guards) would be fellow prisoners. These affidavits were not presented earlier because Schlup's trial counsel (and earlier post-conviction counsel) never interviewed his fellow inmates, at least two of whose statements to prison investigators revealed their status as eyewitnesses. In addition, Lieutenant Faherty indicates in his affidavit that several of these prisoners, particularly John Green and Joseph Beck, are reliable witnesses, unlike many prisoners. Affidavit of Robert Faherty, at ¶ 7 (Oct. 26, 1993). Essentially what the district court and implicitly this court require is that one wrongly convicted of a murder in prison present innocents as

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The record now before us reveals that Schlup's counsel did depose McCoy and that McCoy denied having witnessed the incident. Deposition of Ricky McCoy (June 26, 1984). No one asked McCoy about his prior statement that he had witnessed the murder. Under the circumstances counsel was required to compel McCoy's testimony. See infra at ___.

[4]John Green's affidavit was not part of the record before the trial court, nor was the transcript of his testimony in Rodnie Stewart's trial. The record has expanded repeatedly before our court at the request of both the parties and the court. Lieutenant Robert Faherty's affidavit has been added, as have the thirty-nine depositions (of thirty-eight individuals) taken from the prosecutor's files.

eyewitnesses and be able to afford competent counsel from the beginning. Schlup could, of course, do neither. Rather than discount these eyewitnesses' statements sight unseen, the district court should have granted Schlup the evidentiary hearing he requested, and then these witnesses could be subject to examination by the state and their credibility could be accurately determined.

The state argues that Schlup's counsel was effective and notes specifically that he deposed thirty-eight witnesses. These depositions were done collectively by Schlup's, Stewart's, and O'Neal's attorneys, in the presence of the prosecutor, over a period extending from June 26 to July 10, 1984. Of the thirty-eight witnesses, fourteen were inmates and the remaining twenty-four were either prison personnel or other law enforcement officers. Eight of the fourteen inmates refused to answer questions, and some of them relied on the Fifth Amendment.

Other inmates were discussed during the deposition of corrections officer George Brooks, who indicated that he had interviewed all of the inmates on walks one through four and that none of these inmates had any knowledge of the incident. Deposition of George Brooks, at 9 (July 2, 1984). Schlup's counsel apparently accepted this testimony as fact and failed to interview the inmates on these walks.[5] This is ample evidence of his

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[5]No evidence in the record supports the majority's assertion that Schlup's trial counsel "arranged" for the taking of these thirty-eight depositions. It appears that the only witnesses deposed were those proffered by the state. If it is true, as the majority suggests, that trial counsel read the statements of the one hundred inmates on walks one through four, he has even less excuse for failing to interview individually Griffin-Bey and McCoy, who both told prison investigators that they had witnesses Dade's murder. Regardless of whether he read the statements, he was obligated to interview these potential eyewitnesses individually. His failure to do so is the essence of Schlup's claim of ineffective assistance. Lest the point be lost in the majority's recitation of what trial counsel did do, let me repeat: at no point before, during, or after trial did Schlup's counsel interview

ineffectiveness, but he was further ineffective in accepting inmates' statements that they would not testify because they had taken the Fifth Amendment.

Our court set the standard for attorney competence in investigating witnesses and compelling their testimony in Eldridge v. Atkins, 665 F.2d 228, 235 (8th Cir. 1981), cert. denied, 456 U.S. 910 (1982):

> When a man's liberty is at stake counsel owes a greater duty than to simply accept someone's hearsay statement that the witness would rather not testify. A lawyer's duty to defend rises to a greater measure of responsibility. A competent lawyer's duty is to utilize every voluntary effort to persuade a witness who possesses material facts and knowledge of an event to testify and then, if unsuccessful, to subpoena him to court in order to allow the judge to use his power to persuade the witness to present material evidence.

Competent counsel are required, as indicated above, to use every means necessary to persuade these witnesses to present material evidence. A witness who pleads the Fifth Amendment

> is not exonerated from answering merely because he declares that in so doing he would incriminate himself — his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, and to require him to answer if "it clearly appears to the court that he is mistaken."

Hoffman v. United States, 341 U.S. 479, 486 (1951) (citations omitted). Schlup's counsel did not give the court that opportunity. He did not interview eyewitnesses to the murder who would have testified that Schlup was not present and did not participate, and he did not compel the testimony of those who

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any of the one hundred potential eyewitnesses made known to him by the state. In this his representation fell below the level required by the Sixth Amendment.

refused to testify. His performance violated Schlup's constitutionally protected right to counsel.

B

In addition to the eyewitness testimony discussed above, Schlup also presents this court with new evidence in support of the alibi defense he presented at trial. That defense consisted of the testimony of several prisoners that Schlup had walked ahead of them to the dining room, the testimony of Lieutenant Faherty that he had spoken to Schlup outside the dining room, and the videotape that shows Schlup as the first inmate to arrive in the dining room.

The importance of the videotape is in the time lapse between when Schlup arrived, when the guards received a call over their radios about the attack on Dade, and when O'Neal and Jordan arrived. No one disputes that Schlup was first in line for lunch on February 3, 1984. The surveillance videotape of the dining room confirms this fact. According to the videotape, one minute and five seconds elapsed from Schlup's entrance into the dining room until the guards received a radio call about the fight. Twenty-six seconds after the guards responded to the radio call O'Neal ran into the dining room dripping blood. Prison investigator George Brooks testified at trial that one could run from the scene of the crime to the dining room in just over thirty seconds, with a brisk walk taking over a minute.

At trial it was believed that the radio call to which the dining room guards can be seen responding was made several minutes after the stabbing had occurred. Captain Eberle testified that he had radioed for help when he first arrived on the scene, which was several minutes after the stabbing. This would arguably have given Schlup time, as the state asserted in its closing arguments, to get to the dining room one minute before the call went out over the radio.

Schlup presents new evidence on this point, however, evidence that apparently was available at the time of trial but was not presented to the jury due to the ineffectiveness of Schlup's trial counsel. John Green, the eyewitness whose testimony is discussed above, did more than simply watch the stabbing on February 3. Sergeant Flowers called out for someone to call the base, and Green did just that. He told the prison investigators about this phone call when he was first interviewed: "I heard Sgt. Flowers calling for officers cause they had had a fight. Couldn't get nobody so he told me to call base to notify them of the fight and that's what I did." Excerpt of Transcript of Inmate Interviews, Exhibit 4A in Support of Petition for Writ of Habeas Corpus (interview of John Green). This phone call took place just after he saw "inmate Dade fall right there in front of the office." Id.

Green's affidavit provides greater detail: "When I called base, it was within seconds of Dade hitting the ground. It could not have been more than a half minute or a minute after he was stabbed by Jordan and O'Neal. It happened very fast." Affidavit of John L. Green, at 4 (Sept. 7, 1993).[6]

Lieutenant Faherty has also expanded on his earlier trial and deposition testimony. He testifies that he was on duty at T-3, a door about halfway between Schlup's cell and the dining room that is kept locked except when inmates are moving from one place to

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[6]Sergeant Peoples, who was the dispatcher at base control at the time of the stabbing, indicated that he had been called by Captain Eberle. Deposition of Ellis R. Peoples, at 9-10 (July 5, 1984). He was not asked about John Green or whether any inmate had called in the fight. He did testify that he kept a log of this incident, and Lieutenant Faherty likewise testified in his deposition of the existence of certain logs. None of these appear in the record, and there is no evidence that they were ever examined by Schlup's trial counsel. One of the difficulties in this case is ascertaining absolute times (it all occurred "about noon"), and these logs would seem to be useful in this regard. The absence of these logs is but further evidence of the ineffectiveness of Schlup's trial counsel.

another. When T-3 was opened from base control at his direction, he saw Schlup "coming down the corridor . . . . He was walking a leisurely pace with his hands in his pockets." Affidavit of Robert Faherty, at ¶ 4 (Oct. 26, 1993). Schlup stopped at a window to yell at someone outside, Faherty reprimanded him, and Schlup walked to T-3. Faherty "patted him down, and he went to the dining room. [Schlup] was not perspiring or breathing hard, and he was not nervous." Id. Faherty was relieved from T-3 shortly after Schlup passed through, and Faherty then went to the dining room. He estimates that Schlup was in his presence (presumably from the corridor the other side of T-3 and into the dining room) for two-and-a-half to three minutes. It would take Schlup another thirty seconds to walk from his cell to where he first entered Faherty's line of sight. Id. at ¶ 6. Counting the minute in the dining room prior to the radio call (when he was presumably in Faherty's presence as well), Schlup left his walk at least three to three-and-a-half minutes before the radio call.[7] If the radio call came in response to John Green's phone call, it is impossible, as Faherty asserts, for Schlup to have participated in Dade's murder.

Given the timing of this call for help and the evidence presented at trial (the videotape, the testimony of Lieutenant Faherty, and the testimony of Brooks on how long it takes to move from the scene of the crime to the dining room), it is not possible that Schlup could have participated in Dade's murder and been in the dining room as the videotape indicates. In short, Lloyd Schlup could not have been in two places at the same time. O'Neal arrived nearly thirty seconds after the radio call, and the prosecution's

[7]Faherty indicates in his affidavit that it must have been five to five-and-a-half minutes from the time Schlup left his cell to the time of the radio call. This is somewhat inconsistent with the details of both his affidavit and his earlier trial testimony and deposition. Any inconsistency should be explored, and perhaps explained, at an evidentiary hearing. One need only rely on the most conservative estimate of a three-minute lapse to conclude that Schlup could not have participated in Dade's murder.

testimony establishes that he took off at a run. He was followed into the dining room by Randy Jordan. Rodnie Stewart had already been detained. Meanwhile, as Schlup has maintained since the beginning, he was simply in the dining room eating his fish sandwich.

II

Despite the weight of this new evidence, the court refuses to reach the merits of Schlup's claim that his counsel was ineffective by declaring the issue subject to procedural bar. The procedural hurdles habeas petitioners must clear stem from two sorts of concerns. First, we wish to insure that state courts are given an opportunity to review such claims before we will review them ourselves, and second, we fear that late-blooming claims of error that could have been raised earlier are little more than dilatory tactics by petitioner's counsel. Neither concern is implicated in this case because Schlup has asserted since the beginning that his trial counsel was ineffective for failing to interview eyewitnesses to Dade's murder.

A

Schlup was convicted on December 11, 1985, after a two-day trial.[8] His conviction was affirmed on February 17, 1987, by the Missouri Supreme Court and the United States Supreme Court denied certiorari on June 8 of that year. See State v. Schlup, 724 S.W.2d

[8]The state asserted at oral argument that we should not "retry" this case on habeas and asked what we would tell the jury that sat through this two-week or three-week long trial, implying that we would somehow be showing disrespect to the jury if we found that Schlup deserved a new trial because of trial counsel's failure to present that very jury with exculpatory witnesses. I repeat that Schlup received only a two-day trial. Had trial counsel presented the exculpatory eyewitnesses now presented, the jury would have received the full picture of Dade's murder, and if it were to credit the new evidence, it would have no choice but to acquit.

236 (Mo.), cert. denied, 482 U.S. 920 (1987). Less than six weeks later Schlup filed for post-conviction relief in the Missouri courts under Rule 27.26 as it then existed. This was the first opportunity that Schlup had to raise the ineffectiveness of his trial counsel because no record had been made which would allow the issue to be raised on direct appeal. Schlup raised the issue loudly and clearly, alleging that his trial counsel was constitutionally ineffective in that he "failed to interview witnesses in support of [his] defense including Robert O'Neal, Van Robinson, Lamont Griffin and Ricky McCoy, who were witnesses to the crime of which Petitioner was convicted, and who would have testified that Petitioner was not one of the three inmates involved." Rule 27.26 Motion at 2, Schlup v. State, No. CV187-3457CC (Circuit Court of St. Charles County, Mo., filed July 18, 1987). Schlup also alleged that his "counsel failed to investigate Petitioner's alibi defense and failed to interview Randy Jordan, who Petitioner believes was in fact the third participant in the murder of which Petitioner was convicted." Id. at 3.

An evidentiary hearing was held at which Schlup's trial counsel testified, and the motion court ruled against Schlup, finding that his trial counsel had been effective. See Schlup v. State, No. CV187-3457CC (Circuit Court of St. Charles County, Mo., Nov. 6, 1987). The court accepted trial counsel's testimony, and found that the witnesses who were not interviewed were either not made known to trial counsel by Schlup or "were known not to have information which would assist the defense." Id. at 4.

Schlup appealed this adverse decision, specifically alleging that trial counsel was ineffective for not interviewing the aforementioned witnesses. Appellant's Brief at 4, Schlup v. State, 758 S.W.2d 715 (Mo. 1988) (No. 70694). The Supreme Court of Missouri ignored this issue when it affirmed the motion court's decision. See Schlup v. State, 758 S.W.2d 715 (Mo. 1988) (en banc).

Schlup then raised the issue in his pro se petition for federal habeas filed in the Eastern District of Missouri. His handwritten petition alleges that trial counsel "[d]id not interview inmate John Green; who was the inmate 'clerk' and gave statement to investigators that he put out the phone call to base control." His amended petition prepared by counsel restated the language of the 27.26 motion, alleging that "Petitioner's trial counsel . . . failed to interview witnesses in support of [the] defense including Robert O'Neal, Van Robinson, Lamont Griffin and Ricky McCoy, who were witnesses to the crime of which petitioner was convicted, and who would have testified that Petitioner was not one of the three inmates involved." First Amended Petition, Attachment to 11(a)(3) at 1 (¶ A(1)), Schlup v. Armontrout, No. 89-0020C(3) (E.D. Mo. filed March 7, 1989). Schlup also alleged ineffectiveness of trial counsel for failure to call "those persons who would have testified that Petitioner was not the third inmate involved in the murder of which he was convicted" including the aforementioned. Id. at 2 (¶ A(5)). Counsel raised this issue in the briefs filed with the district court as well. See Petitioner's Brief at 9-10, Schlup v. Armontrout, No. 89-0020C(3) (E.D. Mo. May 31, 1989).

The district court ruled summarily and without any basis that the claims raised in paragraphs A(1) and A(5), along with others, were "barred from further consideration" because of Schlup's "failure to assert them at trial, to include them in his motion for new trial, to brief them on appeal, or to pursue them in [his] post-conviction proceedings." Schlup v. Armontrout, No. 89-0020C(3), slip op. at 6 (E.D. Mo. May 31, 1989), aff'd, 941 F.2d 1062 (8th Cir. 1991), cert. denied, 112 U.S. 1273 (1992).

Schlup appealed to our court, again arguing that trial counsel had been ineffective for "fail[ing] to investigate and call witnesses, including alibi witnesses, in petitioner's case in chief." Appellant's Brief at 18, Schlup v. Armontrout, 941 F.2d

1062 (8th Cir. 1991) (No. 90-1164EM). Rather than remand the matter to the district court so that it could make the initial determination on the merits (and perhaps conduct the evidentiary hearing that Schlup has never had in federal court), we addressed the merits of his claims and found them wanting.

Had we fully explored the alleged procedural default, we would have found it to be nonexistent. Schlup raised the issue to the Circuit Court of St. Charles County, Missouri, and to the Supreme Court of Missouri, but because the Missouri Supreme Court failed to address the issue the district court ruled that Schlup had failed to raise it in that forum. The Missouri Supreme Court's error was attributed to Schlup, and our ruling only compounded the injustice.

B

We erred in not remanding the case to the district court two years ago. Had we done so, his present counsel, who was appointed immediately following our prior ruling and who is the only truly competent counsel to have represented Schlup since the beginning, would have had an opportunity to develop the record we now have before us and this claim could have been addressed on the merits by the district court as it should have been in the first place.

The only procedural hurdle that remains in Schlup's path is our affirmance of the district court's error in failing to address this claim when it was first presented. There are two routes around this procedural bar. The route pursued in the briefs is the actual innocence or fundamental miscarriage of justice exception to bar, but that exception normally is pursued when the failure to raise the claim earlier can be traced to the petitioner. In this case the fault lies with the federal courts, and the second route around this bar can be remedied most sensibly by this federal court. Justice requires that we correct our prior decision, which we can do by recalling the mandate and remanding the initial

petition to the district court for an evidentiary hearing on the merits of the ineffective assistance claim. Recall of the mandate is authorized "to prevent injustice," 8th Cir. R. 41A, and we have done so in the death penalty context in the past. See Simmons v. Lockhart, 856 F.2d 1144 (8th Cir. 1988). Schlup has asserted that trial counsel was ineffective for failing to interview eyewitnesses since the beginning, and it is time that his evidence to support that claim be heard in open court.

III

If we do not recall our prior mandate, Schlup's claims are barred as either successive, abusive, or procedurally defaulted, see Sawyer v. Whitley, 112 S. Ct. 2514, 2518 (1992), but exceptions must be made if a petitioner adequately asserts either cause and prejudice or a fundamental miscarriage of justice, which is also known as the "actual innocence" exception. See id. at 2518-19. If the evidence Schlup has presented were to stand up in an evidentiary hearing, it would satisfy the actual innocence standard, and we should therefore address the merits of his claim that his counsel was constitutionally ineffective during the guilt phase of his trial. See Strickland v. Washington, 466 U.S. 668 (1984).

A

Under the Supreme Court's decisions on actual innocence, the standard to be applied in this case is stated in Kuhlmann v. Wilson, 477 U.S. 436 (1986), in which Justice Powell stated the requirement that

> the prisoner must "show a fair probability that, in light of all the evidence, . . . the trier of fact would have entertained a reasonable doubt of his guilt." Thus, the question whether the prisoner can make the requisite

> showing must be determined by reference to all probative evidence of guilt or innocence.

Id. at 454 n.17 (Powell, J., for a plurality) (quoting Henry Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970) (footnote omitted)) (emphasis in original). I believe that Schlup has met this standard, but, as the majority correctly notes, our court has applied a different standard, essentially reading the Supreme Court's decision in Sawyer as implicitly overruling Kuhlmann in this regard.

In Sawyer, the Supreme Court affirmed the Fifth Circuit, quoting with approval the test adopted by that court:

> "[W]e must require the petitioner to show, based on the evidence proffered plus all record evidence, a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty."

Sawyer, 112 S. Ct. at 2523 (quoting Sawyer v. Whitley, 945 F.2d 812, 820 (5th Cir. 1991)). The Court then restated the test, changing it markedly in the process, in what has become an all too common sleight-of-hand. Despite its praise for the Fifth Circuit standard (which comes, of course, from Kuhlmann), the Court now requires that one arguing innocence of the death penalty provide "clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty." Id. I also believe that Schlup has satisfied this test, which our court has sua sponte, and in my view erroneously, extended to apply to convictions as well as to sentences. See Appellants' Briefs in Cornell v. Nix, 976 F.2d 376 (8th Cir. 1992) (en banc) (No. 90-1195), and McCoy v. Lockhart, 969 F.2d 649 (8th Cir. 1992) (No. 91-2856), neither of which argue for the extension of Sawyer. The Fifth Circuit, which was affirmed by the Supreme Court in Sawyer,

has not extended that ruling to convictions, ruling instead that the Kuhlmann standard continues to apply to convictions. See Montoya v. Collins, 988 F.2d 11, 13 (5th Cir.) (restricting Sawyer to the sentencing phase and continuing to apply Kuhlmann to the guilt phase), cert. denied, 113 S. Ct. 1630 (1993).

As a panel, we are of course bound by Cornell, but if ever there were a case in which the Supreme Court might wish to clarify the law on this issue, this is the one. Schlup has presented a strong case of actual innocence. I believe it meets the Cornell standard, and I believe it is "truly persuasive" as required by Herrera v. Collins, 113 S. Ct. 853, 869 (1993), but the majority does not. What either the majority or the district court, which noted that Schlup presented a stronger case of actual innocence than did Herrera (and the evidence has only increased since the district court's decision), would do if Schlup were simply required to show a "fair probability" of his innocence is not known, but only our court en banc or the Supreme Court can make that happen.

B

Once Schlup clears the procedural hurdles put in place by this court and the Supreme Court, the merits of his claim of ineffective assistance of counsel must be addressed. Schlup alleges that trial counsel's failure to conduct a reasonable investigation of the circumstances surrounding the murder deprived him of his rights under the Sixth Amendment. See Strickland, 466 U.S. 668. Petitioners alleging ineffective assistance of counsel must show both that counsel's performance failed to meet "the standard of reasonableness under prevailing professional norms" and that "but for counsel's ineffective assistance there is a reasonable probability that the result of the trial would have been different." Grooms v. Solem, 923 F.2d 88, 90 (8th Cir. 1991). The test for prejudice is substantially easier to satisfy than is the test for actual innocence (which I have already indicated Schlup's

evidence satisfies), so the only remaining question is whether the newly presented evidence could, and should, have been discovered by competent trial counsel.

Despite having access to transcripts of prisoner interviews, some of which contained statements of eyewitnesses, Schlup's counsel failed to conduct any reasonable investigation.[9] This court has held repeatedly that failure to interview potential alibi witnesses constitutes a lack of competence under Strickland. See, e.g., Grooms, 923 F.2d at 91; Lawrence v. Armontrout, 900 F.2d 127, 129-30 (8th Cir. 1990). Failure to interview potential eyewitnesses is unquestionably a more egregious failing than failure to interview alibi witnesses. In this case, Schlup offers both eyewitnesses and, at least indirectly, an alibi witness, all of whom would have been uncovered by a reasonable investigation of the circumstances surrounding Dade's murder.

John Green's statement that he had called the base, a statement that certainly would have bolstered Schlup's alibi, was available to trial counsel in the transcript of prisoner interviews conducted by Brooks.[10] Had counsel then interviewed Green, he could have asked the question that none of the transcripts of prisoner interviews reveals to have been asked of any prisoner:

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[9]Schlup's trial counsel apparently failed even to inquire of Stewart's and O'Neal's counsel about potential eyewitnesses. Both of these trials took place before Schlup's and both defense counsel presented eyewitnesses to Dade's murder. Some of those witnesses might not have helped directly, but counsel would have at least become aware that the crime occurred in a crowded cellblock and that the possibility of eyewitnesses should be investigated.

[10]I assume that transcripts of the prisoner interviews were available to trial counsel. Were they unavailable, Schlup is entitled to relief under Brady v. Maryland, 373 U.S. 83 (1967), due to the prosecution's failure to turn over such exculpatory evidence in violation of due process.

Was Lloyd Schlup present at Dade's murder?[11] Counsel would have had further incentive to interview McCoy[12] and Griffin-Bey, who both admitted to prison investigators that they witnessed the crime. They too could have been asked whether Schlup was present.

Even if counsel were not made aware either by Schlup or by prison authorities that there were witnesses to the murder, he was obligated simply by common sense to investigate the possibility. This murder occurred as prisoners were being released from their cells to go to lunch. The existence of witnesses to the murder was as inevitable as their reluctance to cooperate either with prison investigators or with a room full of lawyers and O'Neal.[13] Counsel's failure to investigate these witnesses and the other

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[11]George Brooks indicated in his deposition that he only asked the inmates if they had witnessed Dade's murder or anything else unusual on that date. In short, the inmates were being asked by prison guards to "snitch" on fellow inmates when the eyewitnesses were all too aware that the guards were in no position to provide protection from the perpetrators and their cronies. This murder took place in the Special Management Unit, also known as "SuperMax," yet even prison personnel were fearful of appearing in this area alone. See Deposition of William Rutledge, Associate Warden, at 16, 19 (June 29, 1984). The latest inmate affidavits indicate that they too were afraid to travel alone even to lunch, as evidenced by several of them waiting for friends before walking to the dining room.

[12]Counsel did depose McCoy but the record indicates no effort to interview him outside of the presence of the prosecutor or O'Neal. One purpose of such an interview might have been to reconcile his deposition with his earlier statement to prison investigators. See supra n.3. Schlup's counsel informs us that McCoy is now dead, so I presume no further explanation will be forthcoming.

[13]Several of the depositions of inmates who refused to answer questions reflect the prosecutor's belief that O'Neal was responsible for the inmates' reticence. It seems quite likely that an interview in O'Neal's presence would not be the most conducive environment in which to gain the cooperation of eyewitnesses, yet the record reveals that Schlup's counsel made no effort to contact eyewitnesses (as opposed to alibi witnesses) individually.

eyewitnesses was unreasonable under our case law, and Schlup is therefore entitled to relief if these witnesses' testimony were to survive the rigors of an evidentiary hearing.

IV

Under Delo v. Blair, 113 S. Ct. 2922 (1993) (per curiam), all that is required for a stay to issue on a second or subsequent habeas petition is that the petitioner present "'substantial grounds upon which relief might be granted.'" Id. at 2923 (quoting Herrera v. Collins, 113 S. Ct. 853, 873 (1993) (O'Connor, J., concurring)). In Blair, the Court objected to the issuance of a stay because the district court had stated that the facts in that case mirrored those that the Court had recently rejected in Herrera. This case is distinguishable on a number of grounds.

First, Schlup is not relying exclusively on a constitutional claim of actual innocence, but is using innocence as a gateway to reach the merits of his ineffective assistance claim. Second, the district court indicated that Schlup has presented a stronger case than did Herrera in that Schlup's affidavits do not consist of hearsay but of eyewitness testimony, and Herrera was, in the opinion of the district court, "convicted on the basis of a larger quantity of evidence than was presented at [Schlup]'s trial." Schlup v. Delo, No. 4:92CV00443, slip op. at 11 (E.D. Mo. Aug. 23, 1993).[14] Third, those affidavits presented by Schlup that identify

[14]The only significant evidence presented by the state at Schlup's trial was the testimony of two prison guards who gave conflicting statements as to the details but who both testified that Schlup was the third participant with O'Neal and Stewart. Unlike O'Neal, whose clothing was covered with Dade's blood, no physical evidence linked Schlup to this crime. Neither guard has ever been asked about Randy Jordan, whom Schlup asserts was the prison "snitch." In addition, Schlup's counsel informed us during oral argument that one of the two prison guards has, and had at the time of Schlup's trial, a criminal record that includes three felonies. Under Missouri law, these felonies, though not of recent

the actual perpetrator point to Randy Jordan, whose whereabouts are presently unknown but, unlike in Herrera and Blair, who is not known to be deceased. And fourth, Schlup has maintained his innocence since the beginning, while both Blair and Herrera had, knowingly and voluntarily or not, confessed. Schlup presents a much stronger case of actual innocence than did either Blair or Herrera. The present petition presents substantial grounds upon which relief might be granted, and we should therefore stay Schlup's execution and remand this case to the district court for an evidentiary hearing.

V

The legal rulings by this court and by the district court place Lloyd Schlup in an inextricable bind. Why, the court asks, did you not present this evidence sooner? Because my earlier counsel failed to conduct a reasonable investigation, Schlup responds. Why then do you not present us with pillars of the community to prove your innocence? Because the crime occurred in prison, he replies, and few pillars of the community occupy prison cells. That, says the court, is unfortunate, for absent virtuous eyewitnesses or a time machine, there is nothing we can do. Just as the Ninth Circuit told Henry Deutscher in regard to his death sentence,[15] this court tells Lloyd Schlup in regard to his

origin, could have been introduced to impeach Maylee if trial counsel had only conducted sufficient investigation to uncover their existence. The record reveals no evidence that such an inquiry took place, and the jury was consequently deprived of this evidence as well.

[15]See Deutscher v. Whitley, 991 F.2d 605, 606 (9th Cir. 1993) (holding that although Deutscher had "shown to [the court's] satisfaction that it is more probable than not that, but for his constitutionally deficient counsel, he would not have been sentenced to die," he nonetheless did not satisfy the new standard set by the Supreme Court in Sawyer, and consequently did not merit relief).

conviction: You may indeed be innocent, but you are not innocent enough early enough.

Justice requires that we remand this matter to the United States District Court for an evidentiary hearing.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 93-3272EM

Lloyd Schlup,

Appellant,

v.

Paul Delo, Superintendent, Potosi Correctional Center,

Appellee.

[TO BE PUBLISHED]

Filed: November 17, 1993

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

ORDER

The suggestion for rehearing en banc and the motion for stay of execution are denied. Chief Judge Arnold, Judge McMillian, and Judge Wollman would grant the suggestion and the motion.

RICHARD S. ARNOLD, Chief Judge, dissenting, joined by McMILLIAN and WOLLMAN, Circuit Judges.

I would grant the suggestion for rehearing en banc to consider two questions raised by the petitioner Lloyd Schlup.

1. Schlup argues that he is actually innocent of the crime of capital murder in the sense necessary to enable this Court to avoid the state's procedural defenses and reach the merits of his contention that his trial counsel was ineffective. In assessing this claim, our panel applied the rule of McCoy v. Lockhart, 969 F.2d 649 (8th Cir. 1992). In McCoy, we held that a miscarriage of justice for purposes of avoiding procedural defenses can be found only when petitioner has shown by clear and convincing evidence that but for the constitutional error, no reasonable juror could find him guilty. 969 F.2d at 651. The McCoy Court lifted this standard from Sawyer v. Whitley, 112 S. Ct. 2514 (1992), a case having to do only with the question of punishment, not that of guilt or innocence.

As our panel in the present case acknowledged, there is some warrant for Schlup's argument that Sawyer was intended by the Supreme Court to apply only to questions of punishment, and that the Sawyer opinion itself preserves unchanged, for purposes of the guilt-phase, the earlier standard of Kuhlmann v. Wilson, 477 U.S. 436 (1986) (requiring a petitioner to show a fair probability that, in light of all the evidence, the jury would have entertained a reasonable doubt of his guilt). See Sawyer, 112 S. Ct. at 2519 n.5.

Our panel did what it had to do. It was bound to follow McCoy and it did not, as a panel, err in doing so. It seems to me, though, that there is a substantial question whether McCoy correctly interpreted Sawyer. This is a question of great importance in habeas corpus jurisprudence, and I believe it qualifies as deserving of this Court's en banc time.

2. Petitioner raises another "innocence" issue - this one an independant ground for habeas relief, rather than just a gateway through which procedural defenses can be avoided. As I understand the various opinions in Herrera v. Collins, 113 S. Ct. 853 (1993),

a majority of the Court appears to believe that, in a sufficiently strong case, innocence would be a ground for habeas relief. The case would have to be "truly persuasive" and "extraordinary." We know that these standards were not met in Herrera itself or in Delo v. Blair, 113 S. Ct. 2922 (1993) (per curiam). In Blair, a stay of execution was dissolved on the ground that the evidence of innocence was no more persuasive than that presented in Herrera.

In my view, it is likely that Schlup's evidence of innocence is substantially more persuasive than Herrera's or Blair's. I am not nearly so familiar with the record as the members of the panel, but Judge Heaney's dissent convinces me that there is at least a substantial likelihood that a trier of fact would consider Schlup's evidence sufficiently persuasive to meet the high Herrera standard if an evidentiary hearing were held. To be sure, there are contradictions in both sides' evidence, and I agree with the panel that, even after all of the new evidence is considered, a reasonable jury could still find Schlup guilty. In this sense, the Herrera standard seems easier to meet than the Sawyer standard, which is quite close to that of Jackson v. Virginia, 443 U.S. 307 (1979). In other words, under Herrera, if evidence is newly discovered, a habeas petitioner could obtain relief by making a "truly persuasive" or "extraordinary" case, even if, after considering the new evidence, a reasonable jury could still convict him.

This, at any rate, seems to me the present state of the law. If I am right, Schlup may have a substantial ground for relief. Whether he does or not is admittedly a fact-intensive question, not the sort of thing of which en banc proceedings are normally made. But where human life is at stake, I believe rehearing en banc is appropriate whenever a petitioner makes a substantial claim, even if it is fact-specific.

For these reasons, I would grant the suggestion for rehearing

en banc, and I respectfully dissent from the order denying it.

A true copy.

Attest: Michael E. Gans

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

FILED

AUG 23 1993

U. S. DISTRICT COURT
E. DIST. OF MO.
ST. LOUIS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LLOYD SCHLUP, Petitioner,	)	
v.	)	Cause No. 4:92CV00443
PAUL DELO, Superintendent Potosi Correctional Center, Respondent.	)	

MEMORANDUM AND ORDER

This matter is before the Court pursuant to Lloyd Schlup's Petition for Writ of Habeas Corpus. Also pending before the Court are Petitioner's Supplemental Motion for Evidentiary Hearing, Petitioner's Supplemental Motion to Expand the Record and Respondent's Motion to Vacate Stay of Execution.

I. Background

On March 3, 1986, Petitioner Lloyd Schlup was convicted of the capital murder of Arthur Dade and sentenced to death by the St. Charles County Circuit Court. The murder took place on 1 Walk of Housing Unit 5-A of the Special Management Unit of the Jefferson City Correctional Center (JCCC)[1]. At the time of the murder, Petitioner and Arthur Dade were inmates at JCCC. In separate trials, Robert O'Neal and Rodney Stewart were also convicted of the murder of Arthur Dade. State v. O'Neal, 718 S.W.2d 498 (Mo. banc 1986); State v. Stewart, 714 S.W.2d 724 (Mo. Ct. App. 1986).

Petitioner unsuccessfully appealed his conviction in state

[1] At the time of the murder, JCCC was known as the Missouri State Penitentiary.

court. State v. Schlup, 724 S.W.2d 236 (Mo. banc 1987), cert. denied 482 U.S. 920 (1987). Petitioner also filed a motion for post-conviction relief pursuant to Missouri Supreme Court Rule 27.26 (repealed 1988). The motion court denied relief and the Missouri Supreme Court affirmed. Schlup v. State, 758 S.W. 2d 715 (Mo. banc 1988). Petitioner subsequently filed a petition for writ of habeas corpus in federal court. The court denied the petition. Schlup v. Armontrout, No. 89-0020-C-3 (E.D. Mo. November 21, 1989) (unpublished opinion), aff'd, 941 F.2d 1062 (8th Cir. 1991), cert. denied 112 U.S. 1273 (1992). Immediately after his petition for writ of certiorari was denied by the United States Supreme Court, Petitioner filed a Motion for Reconsideration of the Judgment pursuant to Fed. R. Civ. P. 60(b)(6). The district court denied the Rule 60(b)(6) Motion on the ground that Petitioner's successive claims were untimely filed and Petitioner's new claims were best raised in a petition for writ of habeas corpus. Schlup v. Armontrout, No. 89-0020-C-3 (E.D. Mo. March 10, 1992)(unpublished opinion). Petitioner filed the instant petition on March 11, 1992.

Petitioner asserts the following seven claims in support of his petition: (1) Petitioner has newly discovered evidence that establishes his innocence of the murder; (2) trial counsel was ineffective because he failed to interview or call as witnesses several individuals who could have testified that Petitioner was not present at the scene of the murder; (3) trial counsel was ineffective because he failed to investigate, rebut and object to the testimony of the state's key witnesses; (4) the prosecution

failed to disclose material exculpatory evidence concerning Petitioner's involvement in the murder; (5) trial counsel failed to conduct a reasonable investigation into Petitioner's background and mental health; (6) trial counsel was ineffective because he failed to conduct an investigation into the facts and circumstances of the aggravating circumstances presented during the penalty phase of the trial; and (7) the prosecution failed to disclose exculpatory evidence concerning the aggravating circumstances. Claims 1, 3, 4, 6, and 7 are raised for the first time in the instant petition. [Hereinafter collectively referred to as "the new claims."] Claims 2 and 5 were raised in Petitioner's first habeas petition. [Hereinafter collectively referred to as "the successive claims."]

II. The New Claims

A. Standard

The majority of Petitioner's claims are raised for the first time in this petition. The Court may not consider claims raised for the first time in a successive habeas petition if the petitioner has "deliberately withheld the newly asserted ground or otherwise abused the writ." 28 U.S.C. § 2244(b). See also Rules Governing Section 2254 Cases in the United States District Courts, Rule 9(b). The Court may consider new claims raised in a successive petition if the petitioner can establish cause for not previously raising the claims and prejudice from his failure to do so. McCleskey v. Zant, 111 S.Ct. 1454, 1470 (1991); Shaw v. Delo, 971 F.2d 181, 184 (8th Cir. 1992). To establish cause the petitioner must show that

"'some objective factor external to the defense impeded counsel's efforts'" to raise the claim in the first petition. McCleskey, 111 S.Ct. at 1454, 1470 (citing Murray v. Carrier, 477 U.S. 478, 488 (1986)).

Claims that are barred by the cause and prejudice standard may be heard if Petitioner "can show that a fundamental miscarriage of justice would result from a failure to entertain the claim." Id. The scope of the fundamental miscarriage of justice exception is narrow. Sawyer v. Whitley, 112 S. Ct. 2514, 2519 (1992); Nolan v. Armontrout, 973 F.2d 615, 617 (8th Cir. 1992). In Sawyer, the Supreme Court announced that the miscarriage of justice exception applies when the petitioner establishes by "clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." Sawyer, 112 S.Ct. at 2517. The same standard also applies to habeas challenges to the conviction itself. McCoy v. Lockhart, 969 F.2d 649 (8th Cir. 1992). See also Shaw v. Delo, 971 F.2d 181, 185-86 (8th Cir. 1992); Cornell v. Nix, 976 F.2d 376, 381 (8th Cir. 1992)(en banc).

B. Cause

The government bears the burden of pleading abuse of the writ. McCleskey, 111 S.Ct. at 1470. Respondent in the instant case has set forth Petitioner's writ history, identified the new claims in the instant petition and alleged that Petitioner has abused the writ with respect to those new claims. Thus, Respondent has satisfied his burden and the burden shifts to Petitioner to show

cause for failing to raise Claims 1, 3, 4, 6, and 7 in his previous petition and prejudice resulting from his failure to do. See id.

Petitioner asserts three theories in support of his contention that he had cause for failing to raise Claims 1, 3, 4, 6, and 7 in his previous petition. First, Petitioner asserts that his counsel failed to permit him to participate in the litigation of his first petition. Second, Petitioner contends that the conduct of former Missouri Supreme Court Justice Billings intimidated his Rule 27.26 counsel and his first habeas counsel and prevented them from thoroughly investigating and presenting Petitioner's claims. Finally, Petitioner asserts that the State failed to disclose exculpatory evidence. None of these theories is persuasive.

Petitioner maintains that he was denied a meaningful opportunity to participate in the litigation of his first habeas petition.[2] Specifically, Petitioner contends that although he included the names of all known exculpatory witnesses in his pro se petition[3] and in his Rule 27.26 motion, no lawyer ever contacted these witnesses. Petitioner also states that his mother maintains a file of documents concerning her son's case and that she has been frustrated in her attempts to have counsel pursue her suggested avenues of investigation.

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[2] Insofar as Petitioner contends that this failure was due to conduct of Justice Billings, the Court's discussion in Section II.A.ii. of this Memorandum and Order, infra, applies.

[3] Petitioner filed his first petition for writ of habeas corpus pro se. The court appointed counsel to represent Petitioner and granted Petitioner's appointed counsel leave to file an amended petition.

In support of his contention that this alleged conduct constitutes cause, Petitioner cites Williams v. Lockhart, 862 F.2d 155 (8th Cir. 1988). In Williams, petitioner alleged that his trial counsel filed and litigated his first habeas petition without petitioner's knowledge or participation. Id. at 159. The court of appeals remanded the case to the district court for a determination of whether petitioner had consented to the previous habeas petition. The court stated:

> This is a critical question of fact, for Williams should not be allowed to accept [the attorney's] representation and then later disavow it. Conversely, he should not be bound by what [the attorney] did unless he somehow authorized or ratified [the attorney's] efforts on his behalf.

Id. A petitioner may consent to the actions of his attorney either expressly or by implication. Id.

In the instant case, Petitioner does not allege that the attorney who filed his first habeas petition acted without his knowledge or participation. Therefore, the reasoning of Williams is not applicable here. Nor can this element of Petitioner's argument succeed under the assumption that Petitioner has alleged that his habeas counsel was ineffective. Because there is no constitutional right to counsel in a habeas case, the ineffectiveness of habeas counsel does not constitute cause. Coleman v. Thompson, 111 S.Ct. 2546, 2567-68 (1991); Nolan v. Armontrout, 973 F.2d 615, 617 (8th Cir. 1992).

Petitioner also maintains that Justice Billings contacted the Circuit Judge presiding over Petitioner's Rule 27.26 hearing and ordered him to deny all requests for extensions of time. In

addition, Petitioner maintains that the Missouri Supreme Court issued numerous execution warrants against Petitioner during the pendency of his state post-conviction motion thereby requiring Petitioner's Rule 27.26 counsel to spend his time preparing motions for stay of execution rather than investigating Petitioner's case. Petitioner submits several affidavits in support of his contention that Justice Billings regularly admonished circuit judges presiding over capital cases not to entertain delays or grant continuances.

Assuming that Petitioner's allegations are correct, the Court finds that they do not constitute cause for Petitioner's failure to raise Claims 1, 3, 4, 6, and 7 in his previous habeas petition. The alleged difficulties encountered by Petitioner's state post-conviction relief counsel do not explain Petitioner's failure to include his new claims in his first federal habeas petition. Obviously, Justice Billings had no jurisdiction over the judge presiding over the federal habeas case. Nor does Petitioner allege that Justice Billings attempted to interfere with the federal habeas proceedings. By affidavit Petitioner's first federal habeas counsel states that he was reluctant to raise the issue of Justice Billings' conduct in the first federal habeas petition because he had previously experienced reprisals from state court judges after criticizing their conduct. The Court finds, however, that counsel's reluctance to risk the wrath of Justice Billings does not constitute an objective factor external to the defense and therefore cannot constitute cause for Petitioner's failure to raise his new claims in his previous petition.

Petitioner maintains that state officials interfered with his ability to raise the new claims in his previous petition because they had exculpatory evidence in their possession and failed to disclose said evidence to Petitioner. In the portion of Petitioner's Suggestions addressing the merits of his constitutional claims, Petitioner develops his contention that the alleged withholding of this evidence interfered with his constitutional rights at the trial phase. However, Petitioner never develops his claim that the alleged failure to disclose exculpatory evidence to his trial counsel interfered with his ability to present all of his claims in his first habeas petition. Thus, the Court finds that these allegations do not constitute cause under the standard enunciated in McCleskey.

For all of the foregoing reasons, the Court concludes that Petitioner has not shown cause for his failure to raise his new claims in his prior habeas petition. Because Petitioner has not shown cause for failing to raise Claims 1, 3, 4, 6, and 7 in his previous petition, the Court need not consider whether he would be prejudiced by his inability to raise them in the instant case.. McCleskey, 111 S.Ct. at 1474.

C. Miscarriage of Justice Exception

As previously noted, the Court must consider Petitioner's new claims if Petitioner establishes by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found him guilty of the murder of Arthur Dade or eligible for the death penalty under Missouri law.

Claim 1

Petitioner claims that his continued incarceration and imposition of the death penalty violate the due process clause of the Fourteenth Amendment because Petitioner has obtained newly discovered evidence that establishes his innocence. In addition, Petitioner claims that his execution would violation the Eighth Amendment ban on cruel and unusual punishment because it is unconstitutional to execute an innocent person.

The Court may only consider newly discovered evidence in a habeas proceeding when the evidence is directly relevant to the constitutionality of the petitioner's continued incarceration. Townsend v. Sain, 372 U.S. 293, 317 (1963); Herrera v. Collins, 113 S.Ct. 853, 860 (1993). "[T]he existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." Townsend, 372 U.S. at 317.

In the instant case, Petitioner maintains that the evidence is relevant to his claim that the execution of an innocent person would violate the Eighth and Fourteenth Amendments to the United States Constitution and therefore should be considered. Petitioner relies heavily on his claim of actual innocence and he submits as new evidence in support of that claim the affidavits of inmates who assert that they witnessed the murder of Arthur Dade and did not see Petitioner at the scene.[4]

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[4] In his Supplemental Motion to Expand the Record, Petitioner seeks leave to introduce additional affidavits. The Court has reviewed those affidavits and concludes that although they are more detailed than the previously submitted affidavits, they do not change the Court's analysis of Petitioner's actual innocence claim.

The Supreme Court has recently considered whether actual innocence is an independent ground for federal habeas corpus relief. Herrera, supra. Petitioner in Herrera claimed that he was scheduled to be executed for a murder he did not commit. Writing for the Court, Justice Rehnquist noted that actual innocence is not an independent constitutional claim but, rather, "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Id. at 862. See also id. at 869. However, the Court also stated:

> We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high.

Id. at 869. Thus, it is appropriate for the court to consider whether Petitioner has made a persuasive showing of actual innocence.

Herrera supported his claim of actual innocence with affidavits wherein the affiants asserted that Herrera's since deceased brother committed the murder. The Court held that the affidavits were not sufficient to warrant relief on Petitioner's actual innocence claim. The Court noted that the affidavits were filed over eight years after petitioner's trial and stated that

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Therefore, Petitioner's Motion to Expand the Record will be denied.

"there is something suspect about a defense witness who is not identified until after the 11th hour has passed." Id. at 869 (quoting Taylor v. Illinois, 484 U.S. 400 (1988)). See also Bolder v. Delo, 985 F.2d 941, 943 (8th Cir. 1993)(affidavits filed at the eleventh hour and over twelve years after the state trial are to be treated with skepticism); Delo v. Blair, 1993 U.S. LEXIS 4633 (July 21, 1993)(vacating stay of execution imposed by court of appeals even though petitioner submitted seven affidavits in support of his claim of actual innocence). The Court further discredited Herrera's affidavits because all but one of the affidavits consisted of hearsay and the affidavits did not present a consistent account of the murder. Id. at 869. The Court also stated that the affidavits must be considered in light of the proof offered at trial. Herrera, 113 S.Ct. at 870. Herrera had been convicted of murder on the strength of two eyewitness accounts, numerous pieces of circumstantial evidence and a handwritten note in which Herrera strongly implied that he was responsible for the murder. Id. at 872.

The affidavits presented by Petitioner do not suffer from all of the same infirmities that caused the Supreme Court to discredit the affidavits submitted by Herrera. The instant case is also distinguishable from Herrera in that Herrera was convicted on the basis of a larger quantity of evidence than was presented at Petitioner's trial. However, upon review of the transcript, Petitioner's new evidence, and the arguments of counsel, the Court finds that Petitioner has failed to make a persuasive showing of

actual innocence. The affidavits submitted by Petitioner were all executed in the early months of 1992, approximately six years after Petitioner's state court trial. As previously noted, there is something suspect about affidavits produced after a long delay. Herrera, 113 S.Ct. at 872 (O'Connor concurring). Moreover, Petitioner's affiants are all fellow inmates who do not necessarily have a strong incentive to refrain from perjuring themselves. See Hall v. Lockhart, 806 F.2d 165, 168 (8th Cir. 1986). Considered in light of the positive identifications made by Officers Flowers and Maylee, the Court cannot say that these affidavits constitute a persuasive showing of actual innocence sufficient to warrant disruption of the state court's finding of guilt.

Claim 3

The States's primary evidence at trial was the eyewitness testimony of Corrections Officers John Maylee[5] and Lt. Roger Flowers. See TR at 234-94; 331-363. Petitioner contends that Flowers and Maylee gave testimony in the trials of Petitioner's co-defendants O'Neal and Stewart that was inconsistent with their testimony during Petitioner's trial. In addition, Petitioner maintains that the testimony of Flowers was inconsistent with the testimony of Maylee and that both witnesses offered testimony that was inconsistent with prior sworn statements. Petitioner contends that he was denied effective assistance of counsel because his trial counsel failed to adequately investigate, object to and rebut the testimony of Flowers and Maylee.

[5] The testimony of John Maylee was presented by deposition.

In his Suggestions, Petitioner details various inconsistencies between the accounts of the murder given by Officers Flowers and Maylee.[6] Obviously, these discrepancies were before the jury at the time of their deliberations. Moreover, Petitioner's trial counsel emphasized discrepancies between the testimony of Maylee and Flowers in his closing argument. TR. 495-96.

Petitioner also contends that the jury did not have the opportunity to consider certain inconsistencies between Officer Flowers' trial testimony and prior sworn statements.[7] However, upon review of these inconsistencies, the Court cannot say that they are material to a determination of Petitioner's guilt or innocence such that no reasonable juror would have convicted Petitioner had they been noted at trial.

Finally, Petitioner points to certain inconsistencies between the testimony of Officer Maylee and certain previous statements. According to Petitioner, these inconsistencies render suspect Maylee's contention that he was able to see the murder from his position three levels above the scene of the crime.[8] However, as

[6] For example, Officer Flowers testified that he saw Stewart walking toward Dade against the flow of inmates coming out of 1 Walk toward the cafeteria. TR. 242. Officer Maylee testified that he saw O'Neal, Schlup and Stewart running in the same direction. TR. 332.

[7] These inconsistencies concern whether Flowers saw Stewart hitting Arthur Dade in the face or in the stomach and whether Flowers saw Petitioner run toward the back of the hallway after the murder or whether he did not see where Petitioner went after the murder.

[8] The murder took place on 1 Walk of Housing Unit 5-A. 1 Walk is on the first floor of the prison. Maylee was stationed on 7-8 Walk which is on the fourth floor of the prison. Petitioner does

Petitioner notes, trial counsel did address the visibility issue and "established ... that Maylee's ability to view the scene from the top floor of the cell block was at least questionable." Suggestions, p. 26 n. 14 (citing TR. 193-205). The jury had the opportunity to consider the credibility of Maylee and to determine whether he was able to see all that he said he was able to see. The Court finds that the evidence relied upon by Petitioner is not so substantial that had it been introduced no reasonable juror would have credited Maylee's testimony.

Claim 4

As previously noted, Petitioner claims that the state failed to disclose material exculpatory evidence in its possession. Petitioner states that the prison's chief investigators interviewed Lamont Griffin-Bey and Ricky McCoy, two inmates who claimed to have witnessed the murder. Petitioner contends that when Griffin-Bey and McCoy were shown a photograph of Petitioner the witnesses indicated that Petitioner was not involved in the murder of Arthur Dade. In addition, Petitioner claims that several witnesses testified at the trials of Robert O'Neal and Rodney Stewart that Petitioner was not present at the scene of the murder. Petitioner contends that the state did not provide him with this information and the only information he received was "an incomplete transcript of cursory interviews with several inmates." Suggestions, at 75.

Review of the transcript indicates that Petitioner's trial

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not dispute that 1 Walk is visible from certain positions on 7 Walk.

counsel used portions of the transcript of both the O'Neal and the Stewart trials to impeach the testimony of Officer Flowers. TR. 267; 279; 281. In addition, Petitioner acknowledges that he received transcripts of the witnesses' interviews with prison investigators. Thus, the substance of Claim 3 amounts to an allegation that certain witnesses were shown a photograph of Petitioner and indicated that he was not a participant in the murder of Arthur Dade.

As Respondent notes, Petitioner has submitted the affidavit of Griffin-Bey. In addition, Petitioner has submitted the transcripts of the witnesses' interviews with prison investigators. The affidavit of Griffin-Bey is dated January 21, 1992. In his affidavit, Griffin-Bey states that he saw the stabbing of Arthur Dade and Petitioner was not involved. He does not state that prison investigators showed him a photograph of Petitioner. Thus, nothing in the record supports Petitioner's contention that the exculpatory evidence Petitioner relies on even exists. Careful review of the interview transcripts submitted by Petitioner does not alter this conclusion.

Claim 6

Petitioner contends that his trial counsel was ineffective because he failed to conduct an investigation into the facts and circumstances of Petitioner's convictions for the assault of cell-mate Larry Wickizer and the assault and sodomy of fellow inmate Harold Johnson. Petitioner contends that the assault and sodomy of Harold Johnson occurred when Petitioner was experiencing extreme

mental disturbance that caused him to inhale bug spray in order to alter his state of consciousness. Petitioner further states that at his trial for the assault of Larry Wickizer, several witnesses verified Petitioner's contention that the assault was committed in self-defense.

The state introduced evidence concerning the prior convictions during the penalty phase of Petitioner's trial in order to establish that Petitioner had prior serious assaultive criminal convictions and therefore was eligible for the death penalty. See Mo. Rev. Stat. § 565.032.2(1). The state also relied on the fact that Petitioner was incarcerated at the time of the murder. Mo. Rev. Stat. § 565.032.2(9). Assuming for the sake of argument that trial counsel was ineffective for failing to conduct an investigation into the circumstances of Petitioner's prior assault convictions, the Court cannot say that in the absence of this constitutional error no reasonable juror would have found Petitioner eligible for the death penalty. Where the jury finds more than one statutory aggravating circumstance, the subsequent failure of one circumstance does not invalidate the other. Mercer v. Armontrout, 844 F.2d 582, 584 (8th Cir. 1988)(en banc); State v. La Rette, 648 S.W.2d 96, 102 (Mo. banc.), cert. denied, 464 U.S. 908 (1983). Therefore, even assuming that the jury might have viewed the prior assaults in a different light had trial counsel more thoroughly investigated the circumstances surrounding those assaults, a reasonable juror could nonetheless have found Petitioner eligible for the death penalty.

Claim 7

Petitioner states that the government knew and failed to disclose that several witnesses had testified in support of Petitioner's defense of self-defense at his trial for the assault of Larry Wickizer. Evidence concerning Petitioner's conviction for the assault of Larry Wickizer was introduced in the penalty portion of Petitioner's trial. Because Petitioner's conviction for the assault of Larry Wickizer was only relevant in establishing one of two statutory aggravating circumstances, the analysis set forth immediately above applies to this claim as well.

III. Successive Claims

In his first habeas petition, Petitioner claimed, inter alia, that trial counsel was ineffective because he failed to investigate or call additional witnesses[9] and because he failed to introduce psychological or psychiatric testimony as mitigating evidence. The district court held that these claims were procedurally barred due to Petitioner's failure to raise the issues in state court. The court held that the ineffectiveness of post-conviction counsel could not constitute the cause necessary to excuse the procedural default. The Eighth Circuit subsequently announced that the ineffectiveness of post-conviction counsel can excuse a procedural default. Because the record did not contain the evidence necessary

[9] Petitioner raised the claim with regard to the following witnesses: Robert O'Neal, Van Robinson, Lamont Griffin and Ricky McCoy. In his current petition, Petitioner reasserts this claims with respect the aforementioned persons and also includes the trial attorney's failure to interview and call as witnesses the following individuals: Donnie Trendley, Michael Riley, Michael Dunn and John Green.

to determine whether appellate counsel or post-conviction counsel were ineffective, the court of appeals bypassed the procedural bar issue and addressed Petitioner's claims on the merits. Schlup v. Armontrout, 941 F.2d 631 (8th Cir. 1991). The court held that trial counsel was not ineffective for failing to call the additional witnesses because their testimony would be either damaging or repetitive. Id. at 639. With respect to Petitioner's claim concerning mitigating psychological or psychiatric evidence, the court held that the undeveloped evidence "would not with 'reasonable probability' have been likely to change Schlup's sentence." Id. (citing Strickland v. Washington, 466 U.S. at 694, 699-700).

As a general rule, courts may not consider the merits of claims raised in a previous habeas petition when those claims were determined on the merits. Sawyer v. Whitley, 112 S.Ct. 2514, (1992); Kuhlmann v. Wilson, 477 U.S. 436 (1986). However, the court may address successive claims when the ends of justice so require. Sawyer, 112 S.Ct. at 2519; Kuhlmann, 477 U.S. at 454. This exception is governed by the actual innocence standard announced in Sawyer. See Sawyer, 112 S.Ct. at 2518-19.

Claim 2

Petitioner contends that counsel was ineffective for failing to interview and call as witnesses certain inmates who claim to have seen the murder of Arthur Dade and who state that Petitioner was not involved. Certainly these affidavits constitute probative evidence that may or may not have swayed the jury had they been

presented at trial. However, in view of the countervailing evidence that was presented, the Court cannot say that even upon consideration of all of the materials currently in the record no reasonable juror would have voted to convict Lloyd Schlup of the murder of Arthur Dade.

Claim 5

Petitioner contends that his trial counsel was ineffective in that he failed to conduct a reasonable investigation into Petitioner's background and mental health. Petitioner maintains that a reasonable investigation into these matters would have disclosed substantial mitigating evidence including a history of severe child abuse, mental illness, and severe organic brain damage. In support of this contention, Petitioner submits affidavits from family members, an electroencephalograph report and the report of Dr. William A. O'Connor, a licensed clinical psychologist. (Exh. B)

During the penalty phase of Petitioner's trial, the jury heard testimony from Lloyd Schlup's mother regarding Mr. Schlup's difficult upbringing. Schlup v. Armontrout, 941 F.2d 631, 639 (8th Cir. 1991). The jury also heard testimony regarding a prior assault conviction and the fact that the murder of Arthur Dade occurred while Petitioner was incarcerated. The jury determined that these statutory aggravating circumstances rendered Petitioner eligible for the death penalty. Even if the statements of family members, the electroencephalograph report and the report of Dr. O'Connor had been before the jury, it cannot be said that no reasonable juror

would have found that the statutory aggravating circumstances nonetheless rendered Petitioner eligible for the death penalty. See Sawyer, 112 S.Ct. at 2524.

For all of the foregoing reasons,

IT IS HEREBY ORDERED that Lloyd Schlup's Petition for Writ of Habeas Corpus is DENIED.

IT IS FURTHER ORDERED that Petitioner's Supplemental Motion for Evidentiary Hearing is DENIED.

IT IS FURTHER ORDERED that Petitioner's Supplemental Motion to Expand the Record is DENIED.

IT IS FURTHER ORDERED that Respondent's Motion to Vacate the Stay of Execution is GRANTED.

IT IS FURTHER ORDERED that the stay of execution entered in this matter on March 12, 1992 is VACATED as of ten (10) days from the date of this Order.

Dated this 23rd day of August, 1993.

Jean C. Hamilton
UNITED STATES DISTRICT JUDGE

IN THE SUPREME COURT OF THE UNITED STATES

No. 93-A-427

LLOYD E. SCHLUP, JR.,

Petitioner

v.

PAUL DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER

Respondent.

EXHIBIT 1

FACTUAL BRIEF ON THE ISSUE OF INNOCENCE
IN SUPPORT OF MOTION FOR STAY OF EXECUTION

MISSOURI CAPITAL PUNISHMENT
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FACTUAL BRIEF ON THE ISSUE OF INNOCENCE

Mr. Schlup was convicted and sentenced to death for a murder that happened in the Missouri State Penitentiary on February 3, 1984. The state's evidence of Mr. Schlup's guilt at trial consisted of a single eye-witness (a Corrections Officer named Roger Faherty) and the deposition of another Corrections Officer, John Maylee. Both men claimed to have seen Mr. Schlup commit the crime. No physical evidence corroborates their testimony. The murder happened on one-walk of a maximum security housing unit just as the prisoners were let out of their cells to go to the dining room for lunch.

Numerous eye-witnesses who were not called at trial say that Lloyd Schlup was not involved in the murder. Their testimony is corroborated by persuasive evidence that Mr. Schlup was in the dining room when Dade was stabbed. Mr. Dade is an African-American man who was stabbed by members of a white supremacist prison gang, and many of the witnesses who clear Mr. Schlup are African Americans, and friends of Mr. Dade. It is unlikely that they would lie for Mr. Schlup if he were guilty.

The evidence tendered to the court below prompted Judge Heaney to observe, "Schlup presents new evidence of his actual innocence that is truly persuasive." Schlup v. Delo, No. 93-3272, Slip op. at 13 (8th Cir., Nov. 15, 1993). Even the district court, denying relief under the restrictive miscarriage of justice standard now in place in the Eighth Circuit, observed that Mr. Schlup's case is distinguishable from Herrera v. Collins, 113 S. Ct. 853 (1993), because the evidence of Schlup's guilt is weaker, and the evidence of innocence is stronger. Schlup v. Delo, No. 4:92CV000443, Slip op. at 11 (E.D. Mo., Aug. 23, 1993).

Mr. Schlup is probably innocent. Under Cornell v. Nix, 976 F.2d 376 (8th Cir. 1992) (*en banc*), however, he must show that he is so innocent that no reasonable juror could find him guilty. Any reasonable juror would be compelled to find a reasonable doubt as to Mr. Schlup's guilt because the state's evidence is riddled with contradictions, and direct evidence of Mr. Schlup's innocence is consistent with his alibi defense which is supported by a video-tape and the sworn affidavit of a corrections officer who recently came forward after hearing of news coverage about this case.

I. THE TESTIMONY OF THE STATE'S EYEWITNESSES IS UNRELIABLE.

Mr. Schlup's guilt is based entirely on two witnesses who claimed they saw him commit the crime. Many objective factors weigh heavily against the credibility of Roger Flowers and John Maylee. Furthermore, the jury was never told that Maylee had been convicted of three prior felonies.

A. NEITHER WITNESS HAD AN UNOBSTRUCTED VIEW OF THE CRIME.

Roger Flowers said that he saw the crime as he was pulling the master lever opening the cells on 1-walk. He was 35 to 40 feet away from the fight. (Trial transcript, hereafter Trial tr., p. 243). There were two rows of bars between him and the scene of the crime. (See Exhibit 33). There were a number of prisoners between him and the fight, but he cannot name any of them. (Trial tr., p. 275). He saw Rodnie Stewart carry a cup of liquid into 1-walk, but he did not see the other two perpetrators until after Stewart threw the cup in Arthur Dade's face. (Trial tr., p. 242). He never saw the knife, which officer Maylee claimed to have seen from the fourth floor. (Trial tr., p. 251).

John Maylee was stationed on the uppermost level of the four-tier housing unit. (Trial tr., p. 332), about 50 to 60 feet away from the fight. (State v. Stewart, p. 249). His deposition was read to the jury in lieu of his testimony.[1] Trial counsel vigorously argued that the crime could not be seen from Maylee's station. (Trial tr., pp. 349-52). Maylee's first described the incident:

> "I was standing at the lever box that opens and shuts inmates' doors, of HU-5B, 8 walk, when I turned and saw inmates (O'Neal), (Lloyd Schlup), (Rodnie Stewart), and (Arthur Dade), in what looked like a fight on 1 walk of HU-5A, approximately 10 feet west of the inner chain-link gate leading to the upper 1 walk walkway, near the storage room in cell number 43 . . . "

(Exhibit 31) (*emphasis added*). Officer Dan Bowers testimony indicates that Maylee's ability to view the scene from the top floor of the cell block was questionable. (Trial tr., p. 193-205). Maylee admitted that his attention was diverted away from the suspect that he identifies as the defendant. In O'Neal's trial, Maylee testified, "I saw Bob O'Neal. I focused my full attention on Bob O'Neal because he had the weapon." (State v. O'Neal, Tr., p. 288). This statement could have been used very effectively, especially in light of Maylee's admission that he never saw Officer Flowers (Tr., pp. 338-39), and he did not see what happened to Dade or the suspects he identified as Schlup and Stewart after O'Neal left the scene (State v. O'Neal, Tr., p. 318). Maylee later said that he first saw the three suspects approaching Dade as he was squatting down, looking through the

[1]Defense counsel stipulated to the admissibility of the deposition because Maylee was ill, incorrectly stating that there was sufficient foundation for its admission. Mr. Schlup was not present at the deposition. See Coy v. Iowa, 487 U.S. 1012 (1988).

stairs, watching the prisoners proceeding out of 1 and 2 walk toward the dining room. (State v. O'Neal, Tr., p. 255). He later put himself stooping down to look between the railings. (State v. O'Neal, Tr., p. 257). It is quite revealing that in the Stewart trial he admitted that he moved so that he could "get a better look," but by the time he did, "it was all over." (State v. Stewart, p. 246).

B. THE EVENT TOOK ONLY FOUR OR THAN FIVE SECONDS.

In Stewart's trial, Maylee said the crime happened very fast, "oh, four, five seconds maybe." (State v. Stewart, p. 245). Officer Maylee elaborated:

> Q. (by defense counsel) And so this whole thing just took a few seconds?
> A. Yes, it did.
> Q. And, in fact, it happened so fast that by the time you moved to get a better look it was all over?
> A. Yes, it was. The fight was over, yes.

(State v. Stewart, p. 246) (*emphasis added*). It is also beyond dispute that they saw the man they have identified as Mr. Schlup for only a fraction of that time. Flowers testified that he ran to the scene of the crime and grabbed Stewart; the other two fled just as he did so. (Trial tr., p. 243).[2] Maylee claimed that he watched the stabbing, and then saw O'Neal throw the knife out the window; he did not see what happened to the other two. (Trial tr., p. 338).

[2]Flowers first said that approximately a minute or two elapsed between the point that he saw Stewart throw the water and his taking Stewart into custody (transcript, p. 247), but later admitted that he had no idea how long the incident lasted. (tr. 279). In O'Neal's trial, he said it could have been "a second or a minute or two." (Exhibit 25, p. 342).

C. PRIOR STATEMENTS OF EACH WITNESS ARE INCONSISTENT.

1. Roger Flowers' prior inconsistent statements.

At trial, Roger Flowers said that he did not see which direction the other two ran after he grabbed Stewart. (Trial tr., p. 245). In Stewart's trial, Flowers said:

> Q. (by prosecutor) When you [grabbed Rodnie Stewart], what did Schlup and what did O'Neal do?
> A. They get up and run.
> Q. They got up and ran immediately, as soon as you grabbed him?
> A. As soon as I started pulling Stewart up, yes.
> Q. Did you see which direction they ran?
> A. They headed this way (indicating) when I last seen them, back toward the end of the walk.
> Q. That would be toward the end of the walk?
> A. Yes, right.
> Q. That is a dead-end, is it not?
> A. Right, it is.

(Tr. State v. Stewart, p. 85).[3]

This shift in his story is quite damaging; there are others as well. He gave three different versions of the assault. In Stewart's trial, he said he couldn't see if O'Neal and Schlup were hitting Dade as they were on the ground. (State v. Stewart, p. 82). In his deposition, he said Stewart hit Dade in the stomach as Dade lay on the ground (Deposition, p. 41), but in Stewart's trial he testified that Stewart was hitting Dade in the face, not the stomach. (State v. Stewart, p. 134). In Schlup's trial, he said that C.O. Dan Bowers had to use Flowers' keys to unlock a gate to assist Flowers. (Trial tr., pp. 275-276). In

[3] If Mr. Schlup ran down a dead-end corridor, in the opposite direction from the dining room, it is not likely that Sergeant Faherty would have seen him coming down the hall outside the dining room ahead of all the other prisoners. It is also unlikely that he would have been the first prisoner in line for lunch. It reflects on Flowers' veracity that he changed his testimony on this important point only for Mr. Schlup's trial.

Stewart's trial, he testified that he left the gate unlocked; Bowers entered the gate without a key. (State v. Stewart, p. 108).

2. John Maylee's prior inconsistent statements.

Maylee changed his testimony on many facts, including where he was when the murder happened, when he first saw it, and the conduct that he observed. In his deposition, he said that he saw Mr. Schlup, O'Neal and Stewart run against the flow of people bound for the dining room; on the day of the offense, he wrote that the fight was already in progress when he first saw it. (IOC, Feb. 3, 1984; also see part 1A, above). He also said in his IOC that he saw Dade run to the gate after he was stabbed. (Appendix D, Exhibit 7). In O'Neal's trial he said he did not see what happened to Dade after he was stabbed. (State v. O'Neal Tr., p. 318).

Maylee's deposition makes no mention of O'Neal and the others falling to the ground during the assault:

> Q: . . . you saw O'Neal hit Dade in the chest several times?
> A: Yes, Sir.
> Q: What's the very next thing that you saw?
> A: That's when the - the very next thing that I saw was Bob O'Neal break and run.

(Tr., p. 354) (*emphasis added*). In Stewart's trial he said that after the prisoners fell, he moved around the stairwell casing and ran to the bars:

> Q. . . . Do you know how long it took you to move around, or whatever?
> A. Approximately three seconds.
> Q. Okay, from the time that you moved around, when you got to here (indicating) did you look down again?
> A. Yes, sir, I did.
> Q. When you looked again, what did you see? Well, first what did you see then?

A. When I looked down again, I saw Bob O'Neal running down the walk, west, away from the incident.
Q. But, by the time that you got back to here and looked down again, were the three of them still there on top of Dade?
A. They were still in the act of getting up.
Q. Well, were three of them still there, or where was Arthur - where was Robert O'Neal?
A. Robert O'Neal is just started getting back when I looked back down there after the second position.
Q. Was he running?
A. He had been running west down 1 walk.

(State v. Stewart, Tr., pp. 173-75).

In O'Neal's trial, he gives a third version of this event:

Q. Sergeant Maylee, how long did it take you get from the B side of the upper catwalk over to the side?
A. One second, two seconds.
Q. How far of a distance is it?
A. Eight to ten feet.
Q. What were you concentrating on in terms of what were you looking at as you moved across?
A. I was watching Mr. O'Neal.
Q. Did you ever lose sight of him?
A. No.
Q. Even for a split second?
A. No.
Q. What did you next see him do?
A. He was running - got up and run down to the back of the walk which would be west.

(State v. O'Neal, Tr., p. 266).

D. FLOWERS AND MAYLEE CONTRADICT EACH OTHER ON SIGNIFICANT POINTS.

The accounts of Flowers and Maylee contradict each other. Maylee said O'Neal, Stewart and Schlup ran, together, against the flow of inmates who were moving toward the dining room, and saw them stop in front of Dade. (Trial tr., p. 332). Flowers said Stewart walked, alone, toward Dade's cell, O'Neal and Schlup approached Dade from the opposite direction. He kept his eye on Stewart the entire time. (Tr., p. 271-272). Although Maylee

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claimed to have seen the fight from beginning to end, he did not see Flowers intervene in the fight, contrary to Flowers' version of events. (Trial tr., p. 338-39).

Another significant discrepancy is that Maylee said that Stewart threw liquid in Dade's face, then Schlup jumped on his back, and O'Neal charged Dade from the front from a distance of eight feet away and struck Dade in the chest with an object in his right hand. (Tr., pp. 340, 343). Flowers' recollection was substantially different:

Q. (by prosecutor) And while Stewart was throwing that liquid into Mr. Dade's face what, if anything, did you see Schlup and O'Neal do?

A. They run and jumped on the man right about in here. Dade throwed his hands up in front of his face and kind of backed up. They run and jumped on his back, took him down in this corner behind this fence here.

(Tr., p. 250). According to Maylee, Dade was standing when he was stabbed by O'Neal from the front, and O'Neal never fell to the floor with the others; According to Flowers, Dade had to have been stabbed by O'Neal from behind after the three prisoners fell. Furthermore, Maylee puts O'Neal running away before Flowers broke up the fight. (Trial tr., pp. 338-39). This is contrary to Flowers' claim that O'Neal was still on the floor fighting when he grabbed Stewart.

II. MR. SCHLUP PRESENTED A CREDIBLE ALIBI DEFENSE AT TRIAL.

Mr. Schlup's cell was the closest one to the dining room. Bernard Eugene Bailey and Arthur St. Peter occupied cells on 2 walk very close to Mr. Schlup's. As the cells were opened for lunch, Bailey stepped out of his cell and talked to St. Peter about a Louie L'Amour book as they were walking to the dining room. They followed Mr. Schlup, about 8 or 10 feet behind, the

entire way from 2 walk to the dining room. They did not see anything unusual. (Trial tr., pp. 445-57). A video tape from a camera in the dining room showed that Mr. Schlup was the first man in line for lunch, followed by Ricky Easley, Bernard Bailey and Arthur St. Peter. (Trial tr., pp. 388-395). Cole County Deputy John Hemeyer interrogated Mr. Schlup and seized his clothing, shoes and handball. Laboratory tests revealed no trace of blood on Mr. Schlup's clothes.

III. EVIDENCE KNOWN TO COUNSEL OR THE STATE, BUT NOT THE JURY.

A. Lloyd Schlup's recorded statement.

Mr. Schlup has persistently asserted his innocence. The day it happened, he was interrogated by Investigator George Brooks and John Hemeyer. Mr. Schlup denied any involvement, and made a statement that proved to be true in every detail. He said that he was the first one down for lunch, and was followed by Ricky Easley, Bernard Bailey and Arthur St. Peter. The video tape proves this to be true. He said that before he got to the dining room he was reprimanded by a guard for shouting out of an opened window. Lieutenant Faherty's report indicated that this, too, is true.[4] Mr. Schlup speculated that the stains on his shoes were

[4]Upon hearing of recent news coverage about this case, Faherty sought out Mr. Schlup's counsel and made a sworn statement. He states:

> I have re-enacted my encounter with Mr. Schlup, and I can accurately state that Mr. Schlup was in my presence for at least two and a half minutes, and possibly three minutes. It would have taken him about thirty seconds to get from his cell to my line of sight. After he left me, he had another twenty-five to thirty-second walk to get to the dining room. He arrived in the dining room at least four to four and a half minutes after he left

probably ink. Laboratory tests revealed he was again telling the truth. Mr. Schlup said he went directly to the dining room. Because it was a warm day outside, he planned to go outside to play handball after lunch. Hemeyer seized a shirt, a pair of pants, shoes and a handball from Mr. Schlup.[5]

B. Antonio Washington told prison officials about a drug transaction between Dade and Charlie Hurt, a member of the Aryan Brotherhood. The drug deal went sour, and to get even Hurt stole Dade's gold chain. Dade threatened Hurt, and Hurt put out a "contract" for Dade's murder. The racial aspect of the crime lends an high degree of credibility to Lamont Griffin-Bey and several other African-Americans who would be highly unlikely to perjure themselves for Mr. Schlup if he participated in a white supremacist killing.

> the housing unit. He was in the dining room for a little over a minute when I received the radio call. I am positive that when I received the call, Mr. Schlup had left the housing unit at least five to five and a half minutes earlier. I do not see how he could have been involved in the stabbing.

Addendum 2, Affidavit of Robert Faherty, p.2. Mr. Schlup was not perspiring, breathing hard or nervous; "There was nothing about his behavior consistent with his just having been involved in a fight or a stabbing." Id., p. 3.

[5]Mr. Schlup testified in the penalty phase of his trial that he was not involved in the stabbing of Arthur Dade. The Prosecutor vigorously cross-examined him, and under Missouri Law, the Defense was then entitled to introduce into evidence the prior consistent statement that Mr. Schlup gave to prison investigators. Trial Counsel attempted to explore the statement in the guilt phase of the trial, and was prevented from doing so. (tr. 373-377). However, there was nothing to prevent the proper admission of that statement as rehabilitation of Petitioner during the penalty phase of his trial.

C. Witnesses in the O'Neal and Stewart trials.

When O'Neal testified that he stabbed Dade in self-defense, he said Mr. Schlup was not involved, stating, "at that time, I knew who Lloyd Schlup was, but I really made it a habit to stay from Lloyd Schlup. I didn't care too much for him." (Exhibit 17). Donnie Trendley testified in O'Neal's trial that Mr. Schlup was not on 1 walk during the fight. Mike Riley also testified in State v. O'Neal that he saw the fight, but did not see Mr. Schlup. Michael Dunn testified in Stewart's defense that he did not see Mr. Schlup near the scene of the crime.

IV. NEW EVIDENCE OF INNOCENCE.

Eye-witnesses present a compelling case that Mr. Schlup was not involved in the stabbing of Dade. Not a single inmate who saw or participated in the crime implicates Mr. Schlup in the stabbing in any way. Furthermore, a former corrections officer has recently come forward with information so persuasive that no reasonable juror could find Mr. Schlup guilty.

A. THE STATEMENTS OF ROBERT FAHERTY, JOHN GREEN AND THE VIDEO-TAPED ALIBI PROVES THAT IT IS IMPOSSIBLE FOR MR. SCHLUP TO BE GUILTY.

It is indisputable that Mr. Schlup was the first man in line for lunch when Dade was stabbed, and that he had been in the dining room for over a minute when the radio broadcast regarding the stabbing was made. Respondent filed with the court Exhibit T, which includes the statement of John Green, the clerk for Housing Unit 5, who told investigators on February 8, 1984, that he called the control center to alert authorities to the assault within seconds of the murder. The theory the state constructed to refute the video-taped proof of Mr. Schlup's innocence depended upon the assumption that Captain Eberle, who arrived at

the scene about three minutes after the stabbing, was the one who made this call. Mr. Green's statement refutes that theory:

> "I stepped out of the office and I heard Sgt. Flowers calling for officers cause they had a fight. Couldn't get nobody so he told me to call base to notify them of the fight and that's what I did."

(Exhibit T, p. 31). Mr. Green's statement is credible because there is no possible motive for Mr. Green to lie; no one knew of the existence of the video tape at the time of the interview, and he had no way of knowing how the information he was giving would affect the investigation. Because Mr. Green called the control center on the telephone as the assault was in progress, and Mr. Schlup was in the prison dining room for over a minute when the guards responded to the call, Mr. Green's testimony, if true, establishes the impossibility of Mr. Schlup's guilt. Neither the significance nor the credibility of his testimony can be dismissed without a hearing.

A second significant alibi witness has come forward, Lieutenant Robert Faherty. He is the corrections officer on the video tape seen reaching for his radio as the assault call was broadcast. He establishes that Mr. Schlup left the housing unit about five minutes before the radio call was made. He was stationed at the T-3 corridor shown on Exhibit 35. It would have taken Mr. Schlup about 30 seconds to get from the housing unit to Faherty's line of sight; Mr. Schlup was in that corridor with Faherty for two and a half to three minutes, and it would have taken another 25 to 30 seconds for Mr. Schlup to walk from T-3 to the dining room, where the camera proves he was for one minute and five seconds before the radio call was broadcast. By this time, Mr. Schlup had been gone from the housing unit for around

five minutes. Even if Captain Eberle made the call three to four minutes after the stabbing, Mr. Schlup was either on camera or with Officer Faherty when Dade was attacked.[6]

B. PERPETRATORS O'NEAL AND STEWART CLEAR MR. SCHLUP.

Robert O'Neal and Rodnie Stewart have provided the Court with affidavits that directly establish Mr. Schlup's innocence. O'Neal states:

> I was involved in defending myself from Arthur Dade in a fight on 1 walk. Lloyd Schlup was not involved in the fight. I did not see him prior to the fight nor did I see him in the area of the fight afterwards. I did not see him until I arrived in the dining room.

(Appendix A, Exhibit 5-A). In his affidavit, Rodnie Stewart states:

> I was housed in supermax at Jefferson City and saw the incident where Arthur Dade was killed. I never saw Lloyd Schlup around the area before, after, or during the incident. Lloyd's cell is the first one or two on the walk and he was usually the first one down to the dining room. I did not see him that day, except earlier in his cell.

[6]Officer Dan Bower also fixes the time of the stabbing at a point when Mr. Schlup was already gone from the housing unit. He had been in the housing unit, one level up from where the fight occurred. He was the first officer on the scene; Flowers had Stewart pinned against the gate. Flowers ordered him to get Dade on a stretcher, and he told inmate Ricky McCoy to get the stretcher off the wall. (Trial tr., p. 183, 245). In O'Neal's trial, he testified that it took McCoy "at the most thirty seconds" to get back with the stretcher. (State v. O'Neal, p. 363). Captain Eberle arrived just as they were loading Dade on the stretcher. The video tape shows Dade being carried out of the housing unit over a minute and a half after Mr. Schlup arrived in the dining room. For Mr. Schlup to be guilty, one would have to conclude that Dade lay bleeding on the floor for about six full minutes before being taken to the hospital. Dan Bowers establishes the contrary; he was shisked away from the scene within a couple of minutes.

(Appendix A, Exhibit 10-A). On June 27, 1984, Stewart told prison investigators that Randy a/k/a Rocky Jordan helped O'Neal kill Dade. In January, 1992, he told an investigator:

> Stewart said since Hurt was a member of the Aryan Brotherhood and he had been threatened, Robert O'Neal told him he wanted to "hit" Stump, or kill him. Stewart said that O'Neal came to him about killing Dade, and Stewart tried to talk him out of it. He said he didn't want anything to do with it, and he claimed that he told O'Neal that he was crazy for doing it.
>
> Stewart said that the day Dade was killed, Stewart knew O'Neal was going to do it because O'Neal had been drinking wine, which was some kind of home brew made in the penitentiary, and taking Benadryl and smoking dope. Stewart said O'Neal was really wound up, and he wanted Stewart to hold up a sheet so that the guards could not see him kill Arthur Dade.
>
> Stewart told me that Robert O'Neal got Rocky Jordan, also known as Randy Jordan, to help him kill Arthur Dade. Stewart said that when the doors opened for lunch, Rocky Jordan and Bob O'Neal ran to Dade's cell. He said that O'Neal threw hot water on Dade's face, using an orange cup, and that Jordan held Dade while O'Neal stabbed him.

(Exhibit 16, p. 2). Jordan is the man seen in the video tape sitting at the same table with O'Neal in the prison dining room.[7] Unlike Mr. Schlup, neither O'Neal nor Jordan went through the serving line to get a tray of food.

[7] Officer Faherty remembers Randy Jordan:

> [Randy Jordan] was known in the prison by officers and inmates alike as a person in the upper echelon of the Aryan Brotherhood. He had been in many rough prisons across the country and had a reputation as an "enforcer" for the Brotherhood. He was covered with tatoos; I remember one in particular that went clear across his back with the eagle wing symbol of the Aryan Brotherhood.

Addendum 2, p. 3. Counsel has discovered that Mr. Jordan is living in Joliet, Illinois. He refused to be interviewed.

C. NEW EYEWITNESSES CLEAR MR. SCHLUP.

Counsel for Mr. Schlup has attempted to locate and interview all of the prisoners who were incarcerated on 1 and 2 walk in housing units 5A and B on February 3, 1984. Several of them are now deceased, several have been released from prison, and several have not yet been located. Thus far in Counsel's investigation, not a single witness has implicated Mr. Schlup in the stabbing.[8]

Joseph Beck. Flowers and Maylee testified that Dade was stabbed in front of cell number 43. Mr. Joseph Beck, who occupied cell number 43 on February 3, 1984, signed an affidavit that states:

> On February 3, 1984, I was housed in supermax at the penitentiary in Jefferson City, Missouri, in cell 43. I witnessed the knifing of Arthur "Stump" Dade. It happened immediately in front of my cell, 3 - 3 1/2 feet away. Lloyd Schlup was not in sight, not even on the flag, where stabbing took place, never saw Schlup.

(Exhibit 9).

Stanley H. Price, the occupant of the cell next to Arthur Dade's, provides this account of the stabbing:

> When Stump came out, a guy threw bleach and water into his face and then stabbed him five times with a knife that I think was made from a mop ring or handle. Stump tried to get away, but was grabbed from behind by a guy they thought was Lloyd Schlup. Stump threw the guy

[8]The panel found some inconsistencies among some of the prisoner affidavits. Certainly, these are no worse than the inconsistencies in the testimony of the prosecution witnesses. Counsel has not withheld from the court the affidavit of any prisoner who was willing to discuss what he saw. However, at a jury trial, a reasonably competent attorney "might [be] somewhat selective in his evidence presentation, but would not...cast aside all the evidence in this case." Kenley v. Armontrout, 937 F.2d 1298, 1309 (8th Cir. 1991). The point counsel wishes to make here is that not a single prisoner who occupied housing Unit 5 implicates Mr. Schlup in the homicide. The same cannot be said of any of the actual perpetrators.

> off, but collapsed. I was 10 to 15 feet from the murder. I know Lloyd Schlup did not take part in the killing and was not even in the area when it happened.

(Exhibit 7). Until counsel located Price, no one knew what was in the container that was splashed into Dade's face. Price's description of the weapon is identical to the weapon that was recovered.

Emmett Nave states that on February 3, 1984:

> I was released to go to the dining room between 11:00 and 11:30 a.m. I observed Lloyd Schlup going down the stairs in front of me leading to the tunnel to the dining room. To the right of me, I heard a commotion and saw a fight. Lloyd Schlup was approximately 10 feet in front of me, in the tunnel area. He was not near or involved in the altercation.

(Exhibit 6, 6A). Jack Babcock was with Nave, and provides a very consistent account. (Exhibits 10, 10A).

Gary Sonnenberg and Darnel Duckett saw the stabbing, and have signed affidavits that Mr. Schlup was not involved. (Exhibits 5, 5A, 8).

Lamont Griffin-Bey. The stabbing was planned and carried out by members of the Aryan Brotherhood. Griffin-Bey told investigators shortly after the homicide that he saw the murder. Griffin-Bey was aware that O'Neal and Stewart were suspected of the murder, but he also said there was a third person involved who was not charged:

Dearixon:	What did he look like?
Griffin-Bey:	I can't even describe the man.
Brooks:	How do you know they don't got him then?
Griffin-Bey:	Because I know who they got.
Dearixon:	Who have they got?
Griffin-Bey:	They got . . . this guy . . . Bob O'Neal. They got this other little guy, I can't recall his name, but him and Bob was living on the same walk I was on . . . Stewart, Stewart.
Brooks:	Rodnie Stewart?

Griffin-Bey: Yeah. I don't know . . . they said they had a third person or something like that, . . . but they ain't got this guy right here.

Brooks: Was Bob O'Neal or Rodnie Stewart be the one that you saw . . . ?

Griffin-Bey: I am not going to comment on that, you know, ... this is too serious for me.

(Exhibit 1A). Griffin-Bey knew Lloyd Schlup to be wrongly accused of being involved in the stabbing of Arthur Dade. Griffin-Bey's recent statement proves this is the case:

> " . . . on February 3, 1984, I was housed in supermax at the penitentiary in Jefferson City, Missouri. I witnessed the knifing of Arthur Dade on this date. I saw two men and the victim involved in the knifing. I did not see Lloyd Schlup involved in the knifing. I did not see Lloyd Schlup around the area and I was standing approximately 10 feet away from where the incident happened."

(Exhibit 1).

Donnell White. White was Dade's friend. He was walking approximately 3 feet from Dade when he saw three inmates approaching from the opposite direction. One threw something in Dade's face while two others jumped him. One of them threw the knife out the window, while the other one ran. White is certain the Lloyd Schlup is innocent and that the third inmate has never been prosecuted. (Exhibit 11). James Pierce and Courtney Lovelace are other African-American prisoners who have sworn that Mr. Schlup was not involved in the murder. (Exhibits 12, 13).

V. THE EVIDENCE THAT MR. SCHLUP IS INNOCENT IS TOO CREDIBLE TO DISMISS WITHOUT A HEARING; NONE OF THE CONCERNS ABOUT THE CREDIBILITY OF LATE AFFIDAVITS OF PRISONER-WITNESSES APPLIES TO EVERY WITNESS.

The district court found the testimony of eyewitnesses to the stabbing is "suspect" because it was produced "after a long delay," and because "fellow inmates...do not...have a strong

incentive to refrain from perjuring themselves," (Memorandum and Order, p. 12). A full and fair hearing would have demonstrated that not every witness can be so easily dismissed.

A. THE DELAY IN PRESENTING THIS EVIDENCE IS NOT FATAL TO ITS CREDIBILITY

1. John Green, Lamont Griffin Bey, Ricky McCoy, Donnie Trendley and Van Roberson came forward immediately after the crime.

Several witnesses, including John Green[9] and Lamont Griffin Bey, made statements within a day of the stabbing consistent with the affidavits they later provided.[10] Van Roberson, Donnie Trendley and Ricky McCoy came forward, too, but they are now dead. However, it is clear from the questioning that the investigators were not interested in hearing anything inconsistent with the guilt of the suspects they were holding. When a prisoner said he had seen the stabbing, they didn't even ask who was involved. As far as they were concerned, they had their suspects.

---

[9] Officer Faherty remembers several of these men. He said, "John Green, Jack Babcock, Emmett Nave, Joe Beck and Arthur St. Peter are people who have never lied to me, and I would listen to what they have to say, especially John Green. I always thought he would succeed when he got out of prison. He was a unit clerk because he was more credible, reliable and trustworthy than other prisoners, and because he had at least minimal office skills." Addendum 2, p. 3.

[10] The district court noted that Mr. Schlup's mother urged every attorney who ever represented her son to talk to the prisoners who told prison investigators that they saw the murder, and, incredibly, not one single attorney lifted a finger to do this investigation until early 1992. The circumstances of the delay in presenting their affidavits reflect more on the integrity of the bench and bar than it does on the credibility of the witnesses.

2. **There are reasonable explanations for witnesses' not coming forward that do not reflect on their credibility.**

The witnesses who were not discovered earlier should not be ignored for that reason alone. There are facts and circumstances which explain the delay in discovering some of the prisoner witnesses, including the racial tensions in the cell block before and after the stabbing, the identity and methods of the prison investigators, and the fact that no attempt had previously been made on Mr. Schlup's behalf. Prisoners who saw the crime believed that had they admitted seeing it, they would have been pressured by prison officials to "snitch." The stabbing heightened racial tensions in the prison because it was a "hit" of an African-American inmate (Dade) by the Aryan Brotherhood. Many witnesses in Respondent's Exhibit T refer to the racial tension in the prison as the reason for not wanting to answer questions.[11] When Maurice Ford was asked whether the possibility of further retaliation made him tense, he replied, "oh, hell yes." (Respondent's Exhibit T, p. 19). Joe Beck heard rumors about African-American prisoners retaliating for Dade's death. (Id., p. 17). The majority of inmates took the safest course of action, which is simply not to be a witness.

Although the stabbing occurred in a crowded cell block, only Lamont Griffin-Bey and Ricky McCoy were willing to tell investigators who was involved in the stabbing. Prisoners who

[11] "[S]ometimes you see or don't see that's the best way to stay healthy, you see what I'm saying . . . " (interview of inmate Van Roberson, Respondent's Exhibit T, p. 15). Based on Roberson's statement, and the fact that he has been released from prison, Petitioner believed he would be likely to provide reliable testimony establishing Petitioner's innocence. Counsel learned from Roberson's mother that he died about three years ago.

were unwilling to talk freely to prison guards would have talked with a defense attorney. It is certain that many prisoners who said they did not see the murder were not being truthful; the murder happened on a crowded cell block. There were many eye-witnesses besides the two guards and the two prisoners.

B. **MANY INMATES WHO SAW THE CRIME HAVE A STRONG MOTIVE TO REFRAIN FROM PERJURING THEMSELVES.**

Although the Court dismissed prisoner testimony because "fellow inmates . . . do not . . . have a strong incentive to refrain from perjuring themselves," (Memorandum and Order, p. 12), this is not an accurate observation in this case.

1. **It is unlikely that African-American prisoners would perjure themselves if Mr. Schlup were guilty.**

Many of the prisoners who saw the murder, including Emmett Nave, Donnell White, Van Roberson, Ricky McCoy, Courtney Lovelace and James Pierce, are African-Americans, some of whom belong to Black prison gangs. They have a strong disincentive to perjure themselves for a white man convicted of stabbing Dade. Donnell White was standing right next to Dade when the stabbing took place. Dade was his friend. He has no motive to perjure himself for the assassin of his friend.

Several prisoners say in their affidavits that they are reluctant to name the third perpetrator for fear of their own safety. Although these men told counsel that Randy Jordan was involved in the stabbing, they were unwilling to put his name in their affidavits, and expressed reluctance at coming to a hearing at which they would have to name Mr. Jordan as the man who assisted O'Neal and Stewart in the stabbing of Arthur Dade. Counsel has no power to offer them protection of any kind for

their cooperation. However, at an evidentiary hearing, counsel would invoke the subpoena power of the court to compel them to name the real perpetrators.

2. John Green has not been incarcerated since 1986; he has a strong motive against perjuring himself.

Many of the persons known to have been at the scene of the crime on February 3, 1984, are still incarcerated. Because of state laws protecting the confidentiality of parole records, it is difficult to locate those who have been released. John Green was released in January of 1986, and has worked steadily and lived a law-abiding life ever since. He is married and living on a farm in north central Kansas. He has a lot to lose by committing perjury; it is unreasonable to expect he would do so for a man he could not have communicated with in over eight years.

C. THE EYE-WITNESS TESTIMONY OF INNOCENCE IS CONSISTENT WITH MR. SCHLUP'S VIDEO TAPED ALIBI.

The district court never mentioned the video tape which shows that Mr. Schlup was in the dining room when Dade was stabbed. The tape is irrefutable corroboration of the prisoner witnesses, and it shows that the guards' identification of Mr. Schlup is mistaken. It establishes the following sequence of events:

0:00 Mr. Schlup enters the dining room;

1:05 Guards run out of the dining room in response to radio alert;

1:31 Robert O'Neal runs into the dining room, and along the back wall toward the rest room as Mr. Schlup carries his tray to a table. Investigator George Brooks testified that he ran from the scene of the crime to the dining room in 33 seconds, walked it briskly in one minute and three seconds, and walked it

at a normal pace in one minute and thirty seven seconds. (Trial tr., pp. 465-66).

1. The testimony and affidavit of Lieutenant Robert Faherty prove that Mr. Schlup did not commit the murder and dash to the dining room.

Before Mr. Schlup showed up in the dining room, Officer Robert Faherty saw him coming down the corridor, and stop to shout at another prisoner through an open window. (Trial tr., pp. 315-16). Faherty searched him before he continued on to the dining room. This is a long hallway, and Officer Faherty said that besides hollering out the window, there was nothing unusual about his behavior. Mr. Schlup was walking leisurely down the hallway with his hands in his pockets. He was not red in the face, nervous or short of breath. Officer Faherty had seen many fights and stabbings during his career at the missouri State Penitentiary. He notes that "the prisoners involved are invariably mad, scared, excited, out of breath or otherwise hyped up on adrenalin. Lloyd was none of those things." (Addendum 2, p. 3). He also swears that because of the time he spent with Mr. Schlup, "I am positive that when I received the call, Mr. Schlup had left the housing unit at least five to five and a half minutes earlier. I do not see how he could have been involved in the stabbing." (Addendum 2, p. 2).

2. Robert O'Neal's entry into the dining room one minute and thirty one seconds after Mr. Schlup proves that Mr. Schlup could not have been at the scene of the crime.

Officer Brookes testified that he could run from the scene of the crime to the dining room in less than 35 seconds. Immediately after stabbing Dade, O'Neal fled. (Trial tr., p. 251). Flowers did not see where he went. Maylee said that he

ran about 35 feet to a window, broke it, and threw the knife out. (Trial tr., p. 338). He then ran to the utility sink, rinsed the blood off, and ran to the dining room.[12] Larry Farris, one of the officers seen on the video tape running out of the dining room, saw O'Neal hurrying down the last flight of stairs between T-3 and the dining room. (Trial tr., p. 322-26).[13] Farris saw blood on O'Neal's trousers, so he followed him back to the dining room. Allowing a full minute for O'Neal to hurry from the scene of the crime to the dining room, Mr. Schlup had already been on camera for thirty seconds when O'Neal fled the scene. Even generously allowing a couple of minutes for O'Neal to throw the knife out the window and wash in the sink, Mr. Schlup was in the presence of Robert Faherty when O'Neal stabbed Dade.

By suggesting that radio was the only means of communication from the cell block,[14] that the assault call went out when Captain Eberle arrived on the scene with his radio,[15] and that this event took place several minutes after the stabbing, the prosecutor tried to show that the murder happened at least two

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[12]The prosecutor on opening statement said, "O'Neal, who had the knife, ran to a window nearby, broke out the window and threw the knife out the window. And then also ran to the dining room area. First tried to wash some blood off his hands and then ran to the dining room area." (Trial tr. p. 106.) (emphasis added).

[13]No attempt was made at Mr. Schlup's trial to determine whether Mr. O'Neal was walking or running when Officer Farris encountered him. In O'Neal's trial, Farris testified that O'Neal was "walking down the steps hurriedly." (Trial tr., State v. O'Neal, p. 412).

[14]It was not; there is a telephone in the office next to the stairway.

[15]This is not so; Joe Green put out the call as the assault was taking place.

minutes before Mr. Schlup appeared in the dining room. Mr. Schlup has produced proof, which could not have been fabricated, that the call to which the guards responded came inside of a minute after the stabbing. This proof includes the statement of Joe Green and the testimony of corrections officers who passed Robert O'Neal in the hallway as he was fleeing the scene of the crime.

William Foster did not see the crime, but was on the way to the dining room when he heard the commotion on the cell block. Within seconds of the commotion beginning, he had to step aside for the guards who were running out of the dining room. He turned and followed them, and he ended up being one of the prisoners who carried Dade to the hospital. If this man is telling the truth, Mr. Schlup was already in the dining room when the murder happened. When counsel interviewed Mr. Foster, he could not have understood the significance of this fact. The court has not heard his testimony; counsel is convinced he is telling the truth.

Robert O'Neal, who is on death row after being convicted in this crime, found several prisoners to testify that he acted in self-defense. Rodnie Stewart, who is serving a sentence of life without parole after being convicted in this crime, found three prisoners who testified in support of his claim that he was merely an innocent by-stander when Dade was stabbed. Other prisoners exist who support neither O'Neal's claim nor Stewart's claim. Some prisoners dispute the defenses presented by O'Neal and Stewart. However, all prisoners, whether or not they lied for O'Neal or Stewart, swear that Mr. Schlup was not there. Not a single prisoner, Black or White, has said that Mr. Schlup

participated in the crime. It is remarkable that only Mr. Schlup has the unanimous support of prisoner testimony. It is also remarkable that while only white prisoners came to the defense of O'Neal and Stewart, many African-American prisoners have stepped forward to say that Lloyd Schlup is innocent, including one who did so in February, 1984.

Mr. Schlup has tendered a volume of evidence overwhelmingly showing his innocence. Mr. Schlup has shown that he is probably innocent with far greater quality and quantity of evidence than that presented in Herrera v. Collins, 113 S.Ct. 853 (1993). A hearing would show that any reasonable juror would be compelled to find a reasonable doubt that he is guilty.

WHEREFORE, Mr. Schlup moves for a stay of execution to permit him to petition the Court for a writ of certiorari, and for such other relief as the Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed this ____ day of November, 1993, to:

Mr. Frank Jung
Assistant Attorney General
Post Office Box 899
Jefferson City, Missouri 65102

Attorney for Petitioner

AFFIDAVIT OF ROBERT FAHERTY

Comes now affiant, Robert Faherty, and first being duly sworn, states as follows:

1. I was employed as a corrections officer for the Missouri Department of Corrections from September of 1979 to February of 1989, when I left the department at the rank of captain. In February of 1984, I was a lieutenant. The entire time I was with the department, I was stationed at the Missouri State Penitentiary in Jefferson City, Missouri.

2. On February 3, 1984, I was the Zone Lieutenant for the Special Management Unit. Attached to this affidavit is an accurate diagram of the corridor leading to the area where I was stationed. At lunch time, I was stationed in the dining room. Because no one was available to watch the T-3 door, I stood at that station until I could be relieved by another officer. Then I went to the dining room.

3. The door at T-3 is supposed to be locked except when opened by an officer for inmate movement in and out of the dining room. It is secured at all times. The door was locked when I arrived at the station, and I signalled base control to unlock the door. The officer in the control center unlocked the door by remote control. I opened the door and pushed it back so it would stay open for the lunch traffic.

4. A few seconds after I opened the door, I saw Lloyd Schlup coming down the corridor toward me. He was walking a leisurely pace with his hands in his pockets. There was nothing unusual about him. Lloyd stopped at a window a few feet from me and shouted at someone outside. I told him to get out of the window, and he came over to the door where I was standing. I patted him down, and he went on to the dining room. Lloyd was not perspiring or breathing hard, and he was not nervous. There was nothing at all about his behavior consistent with his just having been involved in a fight or a stabbing.

5. Other prisoners came down the hall behind Mr. Schlup. Shortly after my encounter with Mr. Schlup, I was relieved by another officer, who I think was Curtis Bittle. I then went to the dining room. I was standing at the rail by the serving line with officer Clementage when I heard an assault broadcast over my radio, and officers ran to the housing unit. I ran with them, but I never made it to the housing unit because I met Captain Eberle at the bottom of the stairs leading to the housing unit, and he sent me outside to recover the weapon that was used in the assault.

6. I have re-enacted my encounter with Mr. Schlup, and I can accurately state that Mr. Schlup was in my presence for at least two and a half minutes, and possibly three minutes. It would have taken him about thirty seconds to get from his cell to my line of sight. After he left me, he had another twenty-five to thirty-second walk to get to the dining room. He arrived in the dining room at least four to four and a half minutes after he left the housing unit. He was in the dining room for a little over a minute when I received the radio call. I am positive that when I received the call, Mr. Schlup had left the housing unit at least five to five and a half minutes earlier. I do not see how he could have been involved in the stabbing.

7. I am familiar with many of the prisoners who have said that they saw the crime, and while it is true that many inmates cannot be believed, this is not true of all the men who said they saw the crime. John Green, Jack Babcock, Emmett Nave, Joe Beck and Arthur St. Peter are people who have never lied to me, and I would listen to what they have to say, especially John Green. I always thought he would succeed when he got out of prison. He was a unit clerk because he was more credible, reliable and trustworthy than other prisoners, and because he had at least minimal office skills. I am also familiar with Randy Jordan. He was known in the prison by officers and inmates alike as a person in the upper echelon of the Aryan Brotherhood. He had been in many rough prisons across the country and had a reputation as an "enforcer" for the Brotherhood. He was covered with tatoos; I remember one in particular that went clear across his back with the eagle wing symbol of the Aryan Brotherhood. I don't really know Lamont Griffin Bey, Ricky McCoy or Stanley Price, so I can't say anything about them one way or another.

8. At the time of the stabbing, it was written procedure in the housing unit that only one walk would be released for lunch at a time, and the next walk would not be released until all of the prisoners from the other walks had cleared the housing unit. This procedure was not followed on February 3, 1984, because prisoners from two walk were able to get to one walk. This would not have happened had procedure been followed. Sargeant Flowers was the Housing Unit supervisor, and it would have been up to him to follow post orders.

9. I testified at Lloyd's trial, but I was never asked how long Lloyd and I were together in the hall. I have never talked to a defense attorney about Lloyd's case before today. When I was a corrections officer, I was cynical about prisoners and I believed that they were all guilty, and I would not have voluntarily come forward to talk with a defense lawyer. If a defense lawyer had come to see me, I would not have lied to him, but I wouldn't have volunteered any information, either. It is kind of an unwritten rule among corrections officers not to cooperate with defense lawyers.

10. Lloyd Schlup could not be guilty of this crime. Over the ten years I was at MSP, I have seen many fights and stabbings, and the prisoners involved are invariably mad, scared, excited, out of breath, or otherwise obviously hyped up on adrenalin. Lloyd was not any of those things. Also, after learning of all the information in the article, I know that it is not possible that Lloyd could have spent as much time with me as he did and still have been involved in the crime. I have looked at the affidavits and statements of various prisoner, and I recognize several of them as people who are more credible than the typical inmate.

11. I live alone, and I do not have a telephone. A friend read an article in the Columbia Missourian about Lloyd's case and mentioned it to me. I called the paper from a public phone, and they put me in touch with Bill Curry. I am coming forward now because, based on what I know, Lloyd Schlup cannot possibly be guilty, and saying what I know is the right thing to do.

12. I am willing to testify in court.

FURTHER, AFFIANT SAYS NAUGHT.

RAF Jmt

Robert Faherty

State of Missouri)
) ss
County of Jackson)

Subscribed and sworn before me this 26th day of October, 1993.

Beverly S. Taylor

Notary Public

My commission expires:

B. 11/3/93

Notary Public - State of Missouri
Commissioned in Clay County
My Commission Expires Nov. 3, 1993

No. 93-7901

Supreme Court, U.S.
FILED
MAY 19 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

LLOYD E. SCHLUP, JR.,

Petitioner,

v.

PAUL K. DELO, SUPERINTENDENT,
POTOSI CORRECTIONAL CENTER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

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SCHLUP v. DELO
CHRONOLOGICAL LIST OF RELEVANT DATES AND EVENTS

02/03/84	Arthur Dade is killed in the Missouri State Penitentiary
12/09/85	Petitioner Schlup's trial commences
12/11/85	Jury convicts Petitioner and assesses the death penalty
03/03/86	Trial court imposes sentence of death
02/17/87	Missouri Supreme Court affirms Petitioner's conviction and sentence
06/08/87	United States Supreme Court denies certiorari
07/13/87	Petitioner filed motion for post-conviction relief in trial court
11/06/87	Trial court denies motion for post-conviction relief
10/18/88	Missouri Supreme Court affirms denial of post-conviction relief
01/05/89	Petitioner files first petition for writ of habeas corpus petition
11/21/89	United States District Court dismisses first habeas corpus petition
07/22/91	United States Court of Appeals affirms dismissal of first habeas corpus petition
02/23/92	Petitioner files petition for a writ of habeas corpus in Missouri Supreme Court
03/03/92	Petitioner files Rule 60(b) motion in United States District Court

03/04/92	Missouri Supreme Court dismisses petition and issues execution warrant
03/10/92	United States District Court denies FRCP 60(b) motion, but stays execution to allow filing of second habeas corpus petition
03/11/92	Petitioner files second petition for writ of habeas corpus in the United States District Court
08/23/93	United States District Court denies evidentiary hearing and dismisses petition for a writ of habeas corpus
08/27/93	United States District Court enters judgment dismissing petition
08/30/93	United States District Court grants certificate of probable cause
09/07/93	Petitioner files motion pursuant FRCP 59, to reconsider dismissal of petition for a writ of habeas corpus
09/14/93	United States District Court denies motion to reconsider
09/16/93	Petitioner files notice of appeal
10/15/93	United States Court of Appeals denies motion for stay of execution, over dissent by the Hon. Gerald W. Heaney
11/15/93	United States Court of Appeals affirms dismissal of habeas petition, over dissent
11/16/93	Petitioner files petition for rehearing and suggestion for rehearing *en banc*
11/17/93	United States Court of Appeals denies petition for rehearing *en banc*, over dissents

11/18/93	Governor of Missouri grants reprieve
02/14/94	Petitioner files Petition for Certiorari
03/28/94	United States Supreme Court grants Petition for Certiorari

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MISSOURI
EASTERN DIVISION

LLOYD SCHLUP, Petitioner, vs. PAUL DELO, Superintendent, Potosi Correctional Center, Respondent.	)	Case No. 4:92CV00443JCH Filed 3-11-92

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

COMES NOW, Petitioner, Lloyd Schlup, by and through counsel, and petitions this Court for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. In support of his petition, Petitioner states:

1. Petitioner is presently confined in the Potosi Correctional Center in Mineral Point, Missouri, pursuant to a conviction of capital murder and sentence of death entered on March 3, 1986, in the St. Charles County Circuit Court Cause No. CR 185-927FX, after a trial by jury.

2. Petitioner is innocent of the homicide for which he was sentenced to death. His conviction is a direct result of the constitutionally ineffective assistance of trial counsel, who failed to discover and present to the jury

persuasive, direct evidence of petitioner's innocence, consisting of more than a dozen eye-witnesses to the stabbing of Arthur Dade who can clear Petitioner and name the parties actually responsible for Dade's death.

3. These witnesses were not presented to the court during proceedings on Petitioner's First Amended Petition for Writ of Habeas Corpus because counsel therein, Mr. David Howard, ignored repeated requests by Petitioner and his mother, Ms. Nancy Slater, to locate and interview several of these eye-witnesses and to conduct other reasonable investigation. On numerous occasions Mr. Howard was asked to interview Lamont Griffin-Bey, Ricky McCoy, Robert O'Neal, Rodney Stewart, Gary Sonnenberg and others who saw or may have seen the fight that ended in the stabbing of Arthur Dade. On each occasion, counsel complained that the court was not paying his fees or expenses, and that he could not afford to spend the time and resources required to do the investigation.

4. Mr. Howard has further stated that he was intimidated by the personal involvement in Petitioner's case on the part of the former Chief Justice of the Missouri Supreme Court, William H. Billings, who made an ex parte phone call to the state post-conviction hearing judge arbitrarily ordering no further continuances in the post-conviction proceedings. Mr. Howard has had past dealings with the St. Charles County Circuit Court in which he successfully litigated meritorious allegations of judicial misconduct, and he has suffered many professional and personal repercussions as a result. Judicial retalliation [sic] for his representation in that case included disciplinary proceedings initiated by the circuit

court, which Mr. Howard had to defend at great personal expense. To this day, he does not practice law in St. Charles County. As a result, Mr. Howard was incapable of litigating the procedural issues in Petitioner's raised by the conduct of the Chief Justice of the Missouri Supreme Court and the Circuit Court of St. Charles County.

5. The ends of justice would be defeated by attributing to petitioner the inaction of his counsel. Petitioner and his mother have done everything possible to prove his innocence and obtain the assistance necessary to call the court's attention to the fact that there are a number of eye-witnesses to the murder who can establish his innocence. He has included the names of several eye-witnesses in every pro se pleading he has ever filed; he has requested every attorney who has ever represented him to interview these witnesses and present their testimony to the court. Furthermore, the failures of his attorneys are directly attributable to government interference with his counsel.

6. On January 5, 1989, Petitioner filed in the U.S. District Court for the Eastern District of Missouri his original *pro se* Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. He included therein a claim that his trial attorney was ineffective for failing to interview and call as witnesses Lamont Griffin-Bey, Van Roberson, Robert O'Neal, and Rodney Stewart.

7. On March 7, 1989, Mr. Howard filed Petitioner's amended petition with the Court.

8. On September 5, 1989, Petitioner moved the District Court for funds to employ an investigator and to

conduct an evidentiary hearing. This request was denied on September 14, 1989.

9. On November 21, 1989, the Court entered a final Order denying Petitioner's request for habeas corpus relief.

10. Notice of Appeal to the District Court of Appeals was filed on December 19, 1989, and the appellate brief was filed on April 20, 1990.

11. The United States Court of Appeals for the Eighth Circuit denied Petitioner's appeal from this Court on July 22, 1991.

12. The United States Court of Appeals for the Eighth Circuit denied petitioner's Request for Rehearing and Rehearing En Banc on October 9, 1991. Petitioner's timely-filed Petition for Writ of Certiorari is pending in the United States Supreme Court.

13. Petitioner's Suggestions in Support of Petition for Writ of Habeas Corpus, submitted herewith, are incorporated herein by reference.

GROUNDS FOR RELIEF

CLAIM NO. 1

PETITIONER'S CONTINUED INCARCERATION AND THE EXECUTION OF HIS SENTENCE OF DEATH VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE PETITIONER HAS OBTAINED NEWLY DISCOVERED EVIDENCE THAT ESTABLISHES HIS INNOCENCE OF THE HOMICIDE OF ARTHUR DADE, AND BECAUSE THE MISSOURI COURTS DENIED PETITIONER A MEANINGFULL OPPORTUNITY TO PROVE HIS INNOCENCE. FURTHERMORE, IT IS A VIOLATION OF THE EIGHTH AMENDMENT TO EXECUTE A PERSON WHO IS INNOCENT.

Appendix A, submitted herewith, contains the statements, testimony, and/or affidavits of Lamont Griffin-Bey, Ricky McCoy, Robert O'Neal, Donnie Trendley, Michael Riley, John Green, Michael Dunn, Rodney Stewart, Gary Sonnenberg, Emmett Nave, Stanley Price, Dave Corcoran, Darnell Duckett, Jack Babcock, and Joseph Beck, all of whom were present when Arthur Dade was stabbed. Each of these witnesses provides affirmative and direct proof that Petitioner was not involved in Dade's stabbing. The contents of Appendix A are incorporated by reference as though full set out herein.

It was unknown to Petitioner or his counsel at the time of his trial or R le 27.26 motion that Trendley, Riley, Green, Dunn, Stewart, Sonnenberg, Nave, Price, Corcoran, Duckett, Babcock and Beck actually saw the stabbing of Dade, and that if called to testify at petitioner's trial, all of these witnesses would have testified that Petitioner was not involved in the stabbing in any way.

Counsel for the state was aware that O'Neal, Trendley, Riley, Green and Dunn had testified in the trials of Robert O'Neal and Rodney Stewart that petitioner was not involved in the stabbing of Arthur Dade, but did not communicate this fact to Petitioner or his counsel.

Prison officials were aware that Griffin-Bey and McCoy were shown photographs by investigator George Brooks that included a photograph of Petitioner. Both Griffin-Bey and McCoy pointed to Petitioner's photograph and indicated that he was not involved in the stabbing of Dade. Although a cryptic account of the interviews were included in the discovery provided to trial counsel, this fact was never disclosed to the defense.

CLAIM NO. 2

PETITIONER WAS DEPRIVED OF HIS RIGHT TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CONDUCT A REASONABLE INVESTIGATION IN THAT HE FAILED TO INTERVIEW, INVESTIGATE OR CALL SEVERAL WITNESSES AT TRIAL WHO COULD HAVE TESTIFIED THAT PETITIONER WAS NOT PRESENT AT THE SCENE OF THE HOMICIDE OF ARTHUR DADE. A REASONABLE INVESTIGATION WOULD HAVE DISCLOSED THE EXISTENCE OF THESE WITNESSES BECAUSE PETITIONER REQUESTED HIS TRIAL ATTORNEY TO INTERVIEW SEVERAL OF THEM; COMPLIANCE WITH PETITIONER'S REASONABLE REQUEST WOULD HAVE LED TO THE DISCOVERY OF THE BALANCE OF THESE WITNESSES. FURTHERMORE, COUNSEL WAS PROVIDED DISCOVERY WITH RESPECT TO SOME OF THESE WITNESSES WHICH INDICATED THAT THEY WERE PRESENT AT THE SCENE AND OBSERVED THE STABBING. PETITIONER WAS PREJUDICED BECAUSE HE WAS DEPRIVED OF AN OPPORTUNITY TO CONCLUSIVELY ESTABLISH HIS INNOCENCE OF THE OFFENSE.

Appendix A, submitted herewith, contains the statements, testimony, and/or affidavits of Lamont Griffin-Bey, Ricky McCoy, Robert O'Neal, Donnie Trendley, Michael Riley, John Green, Michael Dunn, Rodney Stewart, Gary Sonnenberg-Emmett Nave, Stanley Price, Dave Corcoran, Darnell Duckett, Jack Babcock, and Joseph Beck, all of whom were present when Arthur Dade was stabbed. Each of these witnesses provides affirmative proof that Petitioner was not involved in Dade's stabbing.

Petitioner asked his trial attorney to interview several of these witnesses, and informed him that they could establish that he was not at the scene of the crime. Trial counsel failed to contact any of Petitioner's witnesses. Trial counsel made no effort to interview inmates who were present at the scene of the offense, even though he had in his possession statements and transcripts which indicated that a number of inmates actually witnessed the stabbing. The contents of Appendix A are incorporated by reference as though full set out herein.

CLAIM NO. 3

PETITIONER'S CONVICTION AND SENTENCE VIOLATE THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ADEQUATELY INVESTIGATE, OBJECT TO, AND REBUT THE TESTIMONY OF THE STATE'S KEY WITNESSES, CORRECTIONAL OFFICER MAYLEE AND CORRECTIONAL OFFICER FLOWERS. A REASONABLE INVESTIGATION WOULD HAVE REVEALED THAT EACH OF THESE WITNESSES HAD GIVEN PREVIOUS TESTIMONY IN DEPOSITION AND IN THE TRIALS OF CO-DEFENDANTS O'NEAL AND STEWART, AND SUCH PRIOR TESTIMONY WAS SO CONTRADICTORY WITH THEIR TESTIMONY AT PETITIONER'S TRIAL THAT THE PRIOR TESTIMONY COULD EFFECTIVELY IMPEACH AND REBUT THE TESTIMONY GIVEN IN PETITIONER'S CASE. PETITIONER WAS PREJUDICED BECAUSE THE STATE'S CASE DEPENDED EXCLUSIVELY ON THE BELIEVABILITY OF THESE TWO WITNESSES.

The State's only witnesses linking Petitioner to the offense were Corrections Officers Flowers and Maylee.

Both witnesses testified in previous proceedings against Robert O'Neal and Rodney Stewart, and that testimony is set out in Appendix D, submitted herewith. This testimony contains many serious inconsistent statements by both Flowers and Maylee regarding important aspects of the case.

One example of prior testimony that should have been used in Petitioner's trial is the fact that Flowers stated in an interoffice memo written the day of the offense and testified in the trial of Rodney Stewart that Petitioner fled in the opposite direction from the dining room. Appendix D, Exhibit 2D, p. 85. In Petitioner's trial, he testified that he did not see where Petitioner went. (Trial transcript, p. 244). A video tape taken by the dining room surveillance camera revealed that Petitioner was the very first inmate in line for lunch on the day Dade was stabbed. This is a material inconsistency because if Flowers' testimony from the Stewart trial is true, then the video tape is compelling evidence that Flowers identification of Petitioner as a perpetrator is mistaken.

With respect to Maylee, the issue at Petitioner's trial was whether he could even see the scene of the stabbing from his position on the upper walk. (See Trial transcript, p. 350). Trial counsel's attempt to make this point to the jury failed because he relied *only* on the portions of Maylee's deposition testimony that were read into evidence. (Maylee was allegedly unavailable to testify due to alleged health problems). At petitioner's trial, the deposition testimony used placed Maylee standing on the uppermost walk looking through a barred wall. (Trial Transcript, p. 335). At Stewart's trial, he testified that he had to squat near the floor behind a stairway and look

between the steps to see the fight. (Appendix D, Exhibit 4D, p. 235). In an inter-office memo, Maylee stated that he was standing at the lever box that controlled the cell doors on the fourth level of the walk when the fight began. Appendix D, Exhibit 3D, p. 282. Visibility would not have been unobstructed from any of these points, but it is questionable whether the scene of the fight is visible at all from the lever box. (Appendix D, Exhibit 3D, p. 293).

Appendix D contains many other inconsistencies and independent facts that trial counsel should have used to impeach or rebut the testimony of Maylee and Flowers. The contents of Appendix D are incorporated herein by reference.

CLAIM NO. 4

PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS VIOLATED WHEN THE STATE OF MISSOURI FAILED TO DISCLOSE MATERIAL, EXCULPATORY EVIDENCE TO THE DEFENSE. THE STATE OF MISSOURI KNEW OF SEVERAL WITNESSES WHO COULD TESTIFY THAT PETITIONER WAS NOT INVOLVED IN THE MURDER OF ARTHUR DADE; HOWEVER, THE STATE FAILED TO DISCLOSE THIS FACT TO THE DEFENSE. THIS EVIDENCE INCLUDED, BUT IS NOT LIMITED TO, THE FACT THAT AT LEAST TWO WITNESSES WERE SHOWN PHOTOGRAPHS OF PETITIONER AND INDICATED THAT HE WAS NOT INVOLVED IN THE ALTERCATION. THE STATE ALSO FAILED TO DISCLOSE TO DEFENSE COUNSEL THE FACT THAT IN THE PRESENCE OF COUNSEL FOR THE STATE, FIVE ADDITIONAL WITNESSES TESTIFIED IN THE TRIALS OF ROBERT O'NEAL AND RODNEY STEWART THAT MR. SCHLUP WAS NOT PRESENT AT THE SCENE OF DADE'S STABBING.

Investigators employed by the state of Missouri interviewed Lamont Griffin-Bey and Ricky McCoy in regard to the stabbing of Arthur Dade. Griffin-Bey and McCoy were shown photographs of three suspects in the homicide of Arthur Dade. Both witnesses indicated with respect to Petitioner's photograph that he was not involved in the homicide. However, the discovery provided to defense counsel failed to advise him of the identity of the persons in the photographs, and further failed to advise the defense that each witness referred to a photograph of Petitioner and stated that he was not present at the scene of the crime. Appendix A, Exhibits

1A and 3A. Furthermore, the elected prosecutor, Mr. Tom Brown, was present in the courtroom during the trials of Robert O'Neal and Rodney Stewart, and heard Robert O'Neal, Donnie Trendley, Mike Riley, John Green, and Michael Dunn testify that Petitioner was not involved in the killing of Arthur Dade. Nevertheless, the prosecution failed to advise Petitioner's counsel of the existence of these witnesses or the substance of their testimony. Appendix A, Exhibits 4A, 6A, 7A, 8A, and 9A. The contents of Appendix A are incorporated by reference as though fully set out herein.

* * *

WHEREFORE, petitioner respectfully requests that this Court:

(a) Grant petitioner's Rule 60(b)(6) motion and allow petitioner to consolidate the litigation of all of his claims regarding the constitutionality of his conviction and sentence of death;

(b) Grant petitioner discovery and leave to gather additional evidence in support of his claims;

(c) Grant petitioner an evidentiary hearing and an opportunity to present witnesses, and other evidence in support of his claims;

(d) Continue the Stay of Execution presently in effect pending litigation of these claims; and

(e) Grant other and further relief that the Court may deem just and proper.

Respectfully submitted,

MISSOURI CAPITAL
PUNISHMENT
RESOURCE CENTER

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Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Caption Omitted In Printing)

No. 4:92CV00443(JCH)

RESPONSE TO ORDER TO SHOW CAUSE WHY A WRIT OF HABEAS CORPUS SHOULD NOT BE GRANTED

Comes now respondent, by and through counsel, and states as follows in response to this court's order to show cause why petitioner's petition for writ of habeas corpus should not be granted.

* * *

Statement as to "Actual Innocence"

Petitioner attempts to support his allegation of factual innocence by affidavits from ten inmates who now allege that petitioner was not involved in the murder of Arthur Dade. Although these inmates have now come forward some eight years later, with the assistance of petitioner's counsel, four of these inmates were questioned shortly after the incident by prison investigators and stated that they did not witness the stabbing (Resp.Ex. T, pp. 15, 29, 30, 32, 59). It is amazing how some eight years later they now graphically recall that petitioner was not involved in the stabbing. It is no wonder that the Eighth Circuit Court of Appeals noted that affidavits of inmates are viewed with skepticism. *Hall v. Lockhart*, 806 F.2d 165, 168 (8th Cir. 1986). Inmates have nothing to lose by perjuring themselves in affidavits. *Id.*

This appears to be the case in which numerous inmates, including those now themselves on death row, attempt to come forward and allege that petitioner was not involved.[4] Respondent also questions the motives of petitioner's co-defendants (O'Neal and Stewart) who have now signed affidavits alleging that petitioner was not involved in the stabbing. These affidavits are self-serving because co-defendant O'Neal's affidavit that petitioner was not involved supports O'Neal's self-defense theory forwarded and rejected during his trial. Likewise, Stewart's affidavit that petitioner was not involved is self-serving because it supports his defense forwarded at trial that he was not involved in the stabbing of Dade. Likewise, affidavits of Emmett Nave, Dave Corcoran, and Darnell Duckett are suspect since these individuals were not housed in the same walk in which the stabbing occurred. Moreover, *ALL* the affidavits are vague in that they do not allege that petitioner was not involved but merely allege that they did not *SEE* petitioner in the area.

Recently the Eighth Circuit addressed the issue of actual innocence. In *Cornman v. Armontrout*, No. 91-1718 (8th Cir. March 24, 1992), the Eighth Circuit Court of

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[4] Respondent also questions the propriety of raising this "factual innocence" allegation in his present petition for writ of habeas corpus. Petitioner never attempted to raise this claim in his previous petition for writ of habeas corpus filed with this court. The Fifth Circuit Court of Appeals has recently suggested that the failure to raise the claim of actual innocence in a previous petition for writ of habeas corpus may in and of itself constitute an abuse of the writ. *See Ellis v. Collins*, 956 F.2d 76, 80 (5th Cir. 1992).

Appeals held that the burden of establishing "the fundamental miscarriage of justice exception to the cause and prejudice test" is upon the petitioner. Slip. at 7 n.6. The court further held that "[t]o make such a showing, a petitioner must do more than merely call into question the reliability of an adjudication of legal guilt." Slip. at 8, *quoting Murray v. Carrier*, 477 U.S. 478, 479 (1986). In order to establish actual innocence, the court held that a petitioner:

> must "show a fair probability that in light of all the evidence, *including that alleged to have been illegally admitted* (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial, the trier of facts would have entertained a reasonable doubt of his guilt."
>
> *Kuhlman v. Wilson*, 477 U.S. 436, 455 n.17 (1986) (plurality) (emphasis added) (quoting *Henry J. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142, 160 (1970) (footnote omitted)); *see also Gullett v. Armontrout*, 894 F.2d 308, 310 (8th Cir.),. *cert. denied*, 110 S.Ct. 2213 (1990) (applying plurality opinion in *Kuhlman*).

Cornman v. Armontrout, supra, slip op. at 8. The court held that Cornman had not met "the stringent requirement" by merely claiming that testimony from his sister, his girlfriend, and the boyfriend of one of his sisters was wrongly excluded. Slip at 8.

Furthermore, petitioner raised a claim of actual innocence in his previous petition for writ of habeas corpus and on appeal to the Eighth Circuit in an attempt to

overcome his procedural default in state court. Petitioner alleged that trial counsel's failure to present the testimony of Robert O'Neal, Van Robinson, Lamont Griffin and Rick McCoy was not procedurally barred because it resulted in the conviction of one who is actually innocent. Petitioner alleged that the testimony of O'Neal, Robinson, Griffin and McCoy would have established that petitioner could not have been involved in the murder."

The Court of Appeals rejected petitioner's attempt to overcome the procedural default by injecting his claim of actual innocence holding that "[T]he district Court, however, concluded that Schlup could not demonstrate such injustice" (Resp.Ex. P, p. 4, n.5).

Petitioner attempts to relitigate his claim of actual innocence under a new theory. Petitioner's allegation that the affidavits would establish that no rational trier of fact could have found petitioner guilty fails for several reasons. First, the attempt to relitigate the claim of actual innocence would be foreclosed by the district court's and Eighth Circuit's earlier holding that petitioner is not actually innocent. Petitioner cannot raise a new theory of actual innocence simply because the first theory failed. Moreover, the Court of Appeals noted that petitioner's argument during trial was that "he was innocent of the murder, and he thought to establish that he was not present at the time and place of the offense" (Resp.Ex. P, p. 11). Thus, petitioner's affidavits do not establish actual innocence but is merely cumulative to his trial defense. In fact, the court held that the testimony of additional alibi witnesses would merely have been "repetitive" (Resp.Ex. P, p. 12). The court also found that:

> In light of the numerous aggravating circumstances, including convictions for assault and involvement in a murder while incarcerated, the undeveloped testimony would not have been of sufficient weight to have changed the outcome of Schlup's trial. (Resp.Ex. P, p. 12).

Petitioner now attempts to allege that these additional affidavits which he now presents establishes his innocence. However, since petitioner's claim of actual innocence has been previously rejected by both the district court and the Court of Appeals in petitioner's first round of habeas corpus proceedings, petitioner cannot attempt to reinvigorate his previously rejected claim of actual innocence. Moreover, petitioner has not alleged why he could not have raised this claim during his nearly eight years of litigating this matter. *Cf. Gomez v. U.S. District Court*, No. A-767 (U.S. April 21, 1992) (noting that prisoner could have raised claim in previous rounds of litigation). Petitioner establishes no good reason for this abusive delay.

Furthermore, if petitioner attempts to raise this claim as newly discovered evidence, this claim must fail. A claim of newly discovered evidence is not cognizable as an independent ground for relief.[5] *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). *See also, Evans v. Muncy*, 916 F.2d 163, 165-66 (4th Cir. 1990); *Herrera v. Collins*, 954 F.2d 1029 (5th Cir. 1992), *cert. granted, stay denied*, 112 S.Ct. 1074 (1992). Moreover, petitioner has not

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[5] Respondent questions the claim that this is newly discovered evidence since petitioner alleged a similar claim during his first petition.

shown that counsel breached a duty by failing to interview and investigate or call additional witnesses at trial who would have testified that petitioner was not present at the scene.[6] The Court of Appeals addressed this issue when it found that additional alibi witnesses would have been merely "repetitive" (Resp.Ex. P, p. 12). Likewise, the claim that counsel failed to investigate petitioner's background and mental health and counsel failed to investigate the facts and circumstances presented by the state in the penalty phase, were also resolved by the Court of Appeals (Resp.Ex. P, p. 12).[7] Since these issues were adversely decided against petitioner, he cannot now attempt to relitigate these claims.

Nor can petitioner establish that counsel breached a duty in failing to investigate, object to, or rebut the testimony of two correctional officers.[8] The testimony of the two correctional officers was not so significantly different from that presented at the co-defendant's trial to warrant a finding that counsel's conduct was unreasonable. Counsel extensively cross-examined Roger Flowers during trial

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[6] The Eighth Circuit Court of Appeals also noted that this claim was procedurally barred from review since petitioner did not raise the claim in state court (Resp.Ex. P, p. 9). Likewise, any claim that trial counsel failed to interview the additional ten inmates is also procedurally defaulted since it was not raised in state court. *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986); *Gilmore v. Delo*, 908 F.2d 385 (8th Cir.), *cert. denied*, 111 S.Ct. 20 (1990).

[7] This claim was also held to be procedurally barred by the Eighth Circuit (Resp.Ex. P, p. 9).

[8] As previously stated, this claim is procedurally barred by petitioner's failure to raise the claim in state court. *Smith v. Murray, supra; Gilmore v. Delo, supra.*

(Trial Transcript – hereinafter "Tr." – at 260-283, 286-87, 289-291, 293-294). Counsel further attempted to discredit the statements of John Maylee by establishing contradictions between Flowers' and Maylee's testimony (Tr. 490). Counsel further testified at petitioner's Rule 27.26 evidentiary hearing that he was aware of Maylee's and Flowers' testimony presented at the co-defendant's trial and determined the best strategy was to discredit their testimony by establishing the contradictions (27.26 Evidentiary Hearing Transcript – hereinafter "E.Tr." – at 76).

Petitioner also raises two claims alleging that the prosecutor failed to disclose exculpatory information in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).[9] Petitioner alleges that inmates Griffin and McCoy were shown photographs by investigator Brooks, and that both Griffin and McCoy pointed to petitioner's photograph and told Brooks petitioner was not involved.

Although petitioner has submitted affidavits from inmates Griffin and McCoy, affidavits signed years after the murder and with the help of petitioner's present counsel, neither Griffin or McCoy's affidavits allege that they were shown a photograph of petitioner or that they told officials that petitioner was not involved. Thus, the state had no information from Griffin and McCoy to disclose.

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[9] Again, this claim is procedurally barred by petitioner's failure to raise the claim in state court. *Smith v. Murray, supra: Gilmore v. Delo, supra.*

Petitioner also alleges that the prosecutor failed to disclose the file from petitioner's previous conviction for the assault of Larry Wickizer.[10]

Petitioner has not shown that a violation under *Brady* has occurred. "*Brady* does not oblige the government to provide the defendants with evidence that they could obtain from other sources by exercising reasonable diligence." *United States v. McKenzie*, 768 F.2d 602, 608 (5th Cir. 1985) (citations omitted), *cert. denied*, 474 U.S. 1086 (1986). "When evidence is available equally to the defense and the prosecutrix the defendants must bear the responsibility for their failure to diligently seek its discovery." *Id.*, citing *United States v. Milstead*, 671 F.2d 950, 953 (5th Cir. 1982); see also *Herrera v. Collias, supra.*

Since trial counsel was aware of the testimony give [sic] at the co-defendants trial (E.Tr. 76), there was no *Brady* violation for not disclosing the testimony. Likewise, the prosecutor was not obligated to disclose the entire file from petitioner's previous conviction for assault. See *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Furthermore, petitioner fails to allege that the file from the previous conviction contained favorable information or that the prosecutor had knowledge of any favorable information contained in the file.[11] He further fails to allege that he did not personally possess the

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[10] Again, this claim is procedurally barred by petitioner's failure to raise this claim in state court. *Smith v. Murray, supra; Gilmore v. Delo, supra.*

[11] Richard Callahan was assigned as a special prosecutor during petitioner's trial for the murder of Arthur Dade. Mr. Callahan did not prosecute petitioner for the assault of Larry Wickizer.

information in the file or that counsel did not have access to the information from the previous counsel. Therefore, petitioner's petition for writ of habeas corpus should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MISSOURI – EASTERN DIVISION

(Caption Omitted In Printing)

Case No. 4:92CV00443JCH

(Filed January 19, 1993)

TRAVERSE

COMES NOW Petitioner, by and through counsel, and states as follows in reply to respondent's Response To Order To Show Cause Why Writ Of Habeas Corpus Should Not Be Granted:

I. PETITIONER'S THRESHOLD SHOWING OF INNOCENCE

As anticipated by petitioner in his Suggestions in Support of Petition for Writ of Habeas Corpus (hereafter "Suggestions"), the State has interposed a defense of abuse of the writ. In his response to the Court's order to show cause (hereinafter "Response"), pages 3-8, respondent provides an incomplete summary of the abuse of the writ doctrine, as recently modified in the United States Court decision of *McCleskey v. Zant*, ___ U.S. ___, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991). Respondent omits the legal doctrine discussed in that opinion which is most applicable to petitioner's situation:

> Although the 1966 revision to the habeas statute eliminated any reference an "ends of justice" inquiry, a plurality of the Court in *Kuhlmann v. Wilson*, 477 U.S. at 454, held that this inquiry remained appropriate, and *required* federal courts to entertain successive petitioner when a petitioner supplements a constitutional claim with a "colorable showing of factual innocence."

> The miscarriage of justice exception to cause serves as "an additional safeguard against compelling and [sic] innocent man to suffer an unconstitutional loss of liberty," [citation omitted], guaranteeing that the ends of justice will be served in full.

McCleskey v. Zant, 113 L. Ed. 2d at 545 (emphasis added). The Court's obligation to entertain a successive petition where there is a "colorable showing of factual innocence" was specifically retained by the Court. Omitted from respondent's summary of the doctrine of the abuse of the writ is the fact that even if a petitioner cannot show cause, the failure to raise a claim or present evidence in an earlier petition may nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim. *Id.*[1]

No attempt is made by respondent to discuss the controlling precedent in the Eighth Circuit, *Walker v. Lockhart*, 763 F.2d 942 (8th Cir. 1985) (en banc), in which the court held that a prisoner satisfies his obligation to make a "colorable claim of innocence" where the petitioner

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[1] Respondent suggests in footnote 4, page 11 of his response that a failure to raise to claim of actual innocence in a previous petition may "in and of itself constitute an abuse of the writ." Respondent relies on the fifth circuit case of *Ellis v. Collins*, 956 F.2d 76 (5th Cir. 1992), for this novel proposition. This is not an accurate statement of the holding in that case. The holding in that case was that although Ellis argued his actual innocence, he could not establish a constitutional violation. Similarly, *Gomez v. United States District Court*, 503 U.S. ___, 112 S. Ct. 1652 (1992), relied upon by respondent, has nothing to do with a claim of factual innocence. Petitioner's case is substantially different.

tenders evidence which is "sufficiently credible to deserve the attention of a jury." *Id.* at 949, n.7.[2] Respondent has avoided discussing the exception to the abuse of the writ defense set out in controlling United States Supreme Court cases, and in the eighth circuit cases of *Henderson v. Sargent*, 926 F.2d 706 (8th Cir. 1991), *modified and aff'd*, 935 F.2d 586 (8th Cir. 1992), and *Walker v. Lockhart, supra*. Petitioner refers the court to pages 1-8 of his Suggestions for a correct discussion of the law that applies to the threshold showing of innocence that petitioner has made.

A. THE PRISONER WITNESSES ARE TELLING THE TRUTH

Respondent's discussion of the substantial evidence of petitioner's innocence is extremely cursory and unconvincing. He seems to rest his primary argument on the fact that many petitioner's witnesses are prisoners, and that "affidavits of inmates are viewed with skepticism." (Response p. 11). Respondent's reliance on *Hall v. Lockhart*, 806 F.2d 165, 168 (8th Cir. 1986), should be viewed in the factual context of that case, which is substantially different from petitioner's. Hall's legal claim rested exclusively on the affidavits of his co-defendants, one who recanted his trial testimony against Hall, and the

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[2] Although the United States Supreme Court has recently modified the standard for "actual innocence" of a death sentence, it did not modify the test for actual innocence of an offense. "In the context of a non-capital case, the concept of 'actual innocence' is easy to grasp." *Sawyer v. Whitley*, ___ U.S. ___, 112 S. Ct. 2514, 2520, 120 L. Ed. 2d 269, 281 (1992).

other who was prepared to testify that Hall did not participate in the murders. Rather than addressing the issue of prisoners in general, the court stated that "*recantation* by *convicted co-defendants* is viewed with a considerable element of skepticism. . . . " *Id.* at 168. The court expressed the view that "such evidence should be supported, where possible, by additional and independent evidence." *Id.* Robert O'Neal and Rodney Stewart are not "recanting" any prior statement with their affidavits; neither prisoner has ever said that Mr. Schlup was involved in the crime, and neither testified against him at his trial. Furthermore, the affidavits of all of the prisoners all quite consistent with one another, and are corroborated by substantial independent physical evidence, including a videotape of a surveillance camera, petitioner's own statement corroborated by physical evidence, and substantial inconsistencies in the prosecution's evidence.[3]

Respondent dismisses the witness affidavits that establish Petitioner's innocence because they were made by inmates, some of whom told prison investigators that

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[3] Judge Wollman dissented from the holding of the court with respect to the inmate affidavits because the inmate affidavits were consistent with the statement that Hall made to the police at the time of his arrest. 806 F.2d at 169. Petitioner also made an exculpatory statement to prison investigators consistent with the evidence he has tendered to the Court. Petitioner's statement is corroborated not only by the other prisoners and the video tape, but by the absence of blood on the clothes he was wearing at the time of his arrest. He also told investigators that he hurried to lunch so he could play handball afterward, and he had his handball in his pocket when he was arrested in the dining room. Also, petitioner's cell is the closest cell to the dining room.

they did not see the stabbing. Respondent also argues that several of the inmates are not to be believed because they resided on walks other than 1 Walk, where the murder occurred. This argument reveals his lack of familiarity with the trial evidence and with the scene of the crime; several of the inmates who assisted in loading Dade onto the stretcher and carrying him to the hospital were not housed on 1 Walk. Furthermore, the walks above 1 Walk were also released for lunch, and prisoners on those walks had to use the common stairway between Housing Units 5A and 5B to get to the hall leading to the dining room.[4]

Although some of Petitioner's witnesses told prison investigators that they did not see the murder,[5] respondent fails to discuss any of the circumstances surrounding the murder and the investigation that explain the reluctance of prisoners to admit to being a witness to the crime. Prisoners who saw the crime were aware that had they admitted seeing it, they would have been pressured by prison officials to "snitch" against the people who

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[4] Respondent seems to forget that one of his star witnesses at trial, John Maylee, claimed to have seen the event from one of several walks above 1 walk, although there is some inconsistency in his testimony as to which walk he was on.

[5] Respondent fails to point out that Respondent's Exhibit T reveals much that supports Petitioner's innocence. For example, Lamont Griffin-Bey told prison investigators that he knew they had O'Neal and Stewart charged with the crime, "but they ain't got this guy right here." When asked how he knew they didn't have him, Griffin-Bey said, "Because I know who they got." Respondent's Exhibit T, pp. 33-34.

committed the murder. This particular stabbing heightened racial tensions in the prison because it was rumored to be a "hit" of an African-American inmate (Dade) by members of the Aryan Brotherhood, a white-supremacist prison gang. Many witnesses whose statements are recorded in respondent's Exhibit T refer to the racial tension in the prison as the reason for not wanting to answer questions.[6] When Maurice Ford was asked whether the possibility of further retaliation made him tense, he replied, "oh, hell yes." (Exhibit T, p. 19). He still refuses to discuss the matter with anyone. Joe Beck heard rumors about African-American prisoners retaliating for Dade's death. (Respondent's Exhibit T, p. 17). Many inmates took the safest course of action, which is simply not to be a witness.

Respondent neglects to tell the Court that Exhibit T also includes statements of inmate witnesses who did see the murder. Darnell Duckette (incorrectly referred to as "Duffy" in Exhibit T) stated that he saw the murder. For some incredible reason, he was not asked what he saw, even after he admitted he saw it. He said that he did not know the name of the person who stabbed Dade, but he was not asked to make a photo identification of any of the suspects. (Exhibit T, pp. 52-53). Similarly, respondent fails

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[6] " . . . sometimes you see or don't see that's the best way to stay healthy, you see what I'm saying . . . " interview of inmate Van Roberson, Respondent's Exhibit T, p. 15. Based on Roberson's statement, and the fact that he has been released from prison, Petitioner believed he would be likely to provide reliable testimony establishing Petitioner's innocence. Counsel learned from Roberson's mother that he died about three years ago.

to mention that Jack Babcock admitted that he saw Flowers take Stewart into custody. (Exhibit T, pp. 59-60).

Respondent's Exhibit T provides a great deal of insight into the inability of prison officials to conduct a thorough investigation into occurrences such as this. Although the stabbing occurred in a crowded cell block, only Lamont Griffin-Bey and Ricky McCoy were willing to name the persons involved in the stabbing.[7] Counsel's experience has been that prisoners who are unwilling to talk to prison guards will sometimes talk freely with a defense attorney. In this case, it is practically certain that a number of prisoners who said they did not see the murder were not being truthful, either out of fear of reprisal or hostility towards the prison administration, or both. A thorough review of respondent's Exhibit T reveals that very few of the persons interviewed could fairly be characterized as cooperative, nor could the questioning be fairly described as probing. There are a number of reasons that a rational person would choose not to cooperate in a pending murder investigation in a state penitentiary. Traditional notions of reliable factfinding require that a witness who has made a prior inconsistent statement be confronted with that statement and given an opportunity to admit, deny or explain the prior inconsistent statement or the circumstances under which it was made. *See. e.g., State v. Dent*, 473 S.W.2d 370 (Mo. 1971). Respondent complains about his lack of opportunity to cross-examine these witnesses; Petitioner would

[7] Neither of them put the petitioner at the scene of the crime.

be glad to provide him that opportunity at an evidentiary hearing.

Petitioner has attempted to locate and re-interview as many of these prisoners as possible, but several have not yet been located, some are deceased, and many continue to refuse to talk. Of those who have chosen to discuss the stabbing, all have said that they either witnessed the stabbing, and Mr. Schlup was not present at the scene, or they did not see the stabbing at all. Not a single prisoner has said that he saw Petitioner present at the scene.

B. RESPONDENT'S EXHIBIT T SUPPORTS PETITIONER'S INNOCENCE.

Respondent's Exhibit T contains much that supports Petitioner's innocence, but two very critical facts stand out. First, it proves that Lamont Griffin-Bey, a Black Muslim, provided a statement that is consistent with his more recent statement that Petitioner was wrongly accused of this crime. Given the racial overtones of this case, it is highly unlikely that he would give false evidence to clear a man accused of participating in a racially motivated stabbing of an African-American prisoner by members of a white supremacist organization. Second, Exhibit T reveals that a prisoner, John Green, stated:

> "I stepped out of the office and I heard Sgt Flowers calling for officers cause they had a fight. Couldn't get nobody so *he told me to call base to notify them of the fight and that's what I did.*"

Exhibit T, p. 31. This is crucial evidence because it dramatically increases the probative value of the video-tape.

This is a law suit where innocence can be established by the accurate determination of time, distance and speed. The video-tape showing Petitioner waiting to be served lunch in the prison dining room was the prosecution's biggest obstacle to obtaining a conviction. The video shows Petitioner alone at the head of the line for several minutes before he is joined by other inmates and the serving line is opened. The tape shows that he had been in the dining room for several minutes when the guards ran past the dining room window in response to the call that was put out over the prison radio. Trial counsel, Gene Bushmann, believed that the video tape was persuasive, if not conclusive, evidence of his client's innocence. However, the prosecution dealt with the video-tape by breaking the events into two time frames: The time between the stabbing and Mr. Schlup's arrival in the dining room, and the time between the stabbing and the radio broadcast of the stabbing. The strategy was to shorten the first time frame as much as possible, so that Mr. Schlup would have time to commit the murder and still be first in line for lunch, but to lengthen the second time frame, to show that there was plenty of time for Schlup to go through the serving and begin eating his lunch before the call went out to the guards.

To shorten the first critical time period, the prosecution sent an investigator, George Brooks, to the housing unit to determine how much time it took to get from the scene of the crime to the dining room. The guard testified that it took him one minute and 37 seconds talking normally, one minute and three seconds walking rapidly, and 33 seconds running. (Tr. pp. 465-466). The Court should note, however, that no one testified that Petitioner was

seen running. At trial, two prisoners testified that they walked down to lunch behind Petitioner, and Officer Faherty testified that at one point, Petitioner even stopped to shout out of a window to a prisoner out in the yard. Faherty had to tell him to move along. Also significant is the fact that Flowers testified in the trial of Rodney Stewart that the prisoner he identified as Petitioner ran past him toward the locked end of the walk, in the opposite direction from the stairs, which means that the real culprit took substantially longer to get to the dining room. If he got there at all, he would have arrived at or near the same time as Robert O'Neal, who also fled in that direction and then ran to the dining room. O'Neal was about fifteenth in line for lunch.

To lengthen the second time frame, the prosecution presented testimony that the call to which the guards responded must have been put out by Captain Eberle because he was the first guard with a walkie-talkie to arrive at the scene. Under the prosecutor's theory, Sgt. Flowers wrestled Stewart into custody, gave instructions to inmates who were at the scene, then took Stewart downstairs to the control center, where he told Captain Eberle there was a fight. Captain Eberle went up the stairs,[8] found Dade lying on the floor and then called for help on his walkie-talkie. Since none of the other corrections officers in the area were equipped with walkie-

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[8] It is interesting that Captain Eberle estimated that, responding to an emergency situation, it would take forty five seconds to a minute to get up the stairs leading into Housing Unit 5A, (Tr. 214-215), a small fraction of the total distance from the scene of the stabbing to the dining room that Investigator Brooks testified that he could run in 33 seconds. (Tr. 465).

talkies, the prosecutor represented to the jury that no call had been broadcast earlier. (Tr. 212-13). Thus, according to the prosecutor, Petitioner had ample time to participate in the stabbing, go through the serving line and begin eating his lunch, but still have time to have committed the murder. (Tr. 482-487). Green's statement that he made the call at Flowers' direction before any other officer arrived at the scene flatly refutes the prosecutor's theory of the case – it means that the call went out within seconds of the stabbing, and that therefore the guards who were seen running from the dining room in response to Green's call establish a time frame which makes it physically impossible for Petitioner to have been present when the crime took place. Green's statement is not likely to have been fabricated; at the time of his interview, neither he nor anyone else could have realized the significance of his having made the call to base as the crime was in progress.

Another significant fact revealed in respondent's Exhibit T is that the murder did not happen immediately after the cell block was opened. Sergeant Flowers indicated that the procedure for releasing prisoners to the dining room is that he would open the master level, which opened all of the doors on the individual cells, and he would leave them open for a couple of minutes until the inmates stepped out of their cells, and then he would close the doors again. The prisoners did not immediately head for the dining room because, as Arthur St. Peter said, "Let me explain something, the reason I do stay in front of that cell is because I want to come back and see that everything is there." (Respondent's Exhibit T, p. 20). Even waiting for the doors to close, St. Peter, Ricky

Easley, and petitioner were the first three prisoners into the dining room, as indicated on the surveillance videotape.[9]

It is clear that several prisoners made it down the stairs to the dining room before the fight broke out. Gary Riley, who occupies cell 75 in Housing Unit 5A, which is the fourth cell down from the end of 2 Walk which is farthest from the stairs to the dining room, made it part way down the stairs before he heard the fight, and turned around and ran back up to see Dade fall on the floor. (Respondent's Exhibit T, p. 1). Likewise, William Falston, who occupied the cell next to Riley, was going down the steps when he heard Flowers call for assistance, and he, too, went back up the stairs and saw Dade on the floor. Riley and Falston were among the inmates who helped put Dade on the stretcher and rush him to the hospital. In fact, Falston states that he and the other inmates "ran [Dade] to the hospital in an attempt to save his life." The video surveillance tape, which is made by means of a single machine that is hooked to several cameras, shows that petitioner has already been served his lunch as Dade is being carried away from Housing Unit 5 on a stretcher.

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[9] This is also consistent with the fact that these three prisoners occupied the cells that were closest to the stairway leading down to the dining hall, as indicated by the diagram of Housing Unit 5A, which will be filed with this court under seal as agreed with the Attorney General.

II. THERE IS CAUSE FOR PETITIONER'S INABILITY TO DISCOVER AND FULLY LITIGATE THE CLAIMS PRESENTED HEREIN DURING HIS STATE POST-CONVICTION PROCEEDING IN HIS PREVIOUS PETITION FOR WRIT OF HABEAS CORPUS.

Petitioner agrees with respondent that *McCleskey v. Zant*, 111 S. Ct. 1454, obliges a habeas petitioner to conduct a "reasonable and diligent investigation aimed at including all relevant claims in grounds for relieve [sic] in the first federal habeas petition." *Id.* at 1472. However, respondent completely fails to address the fact that there was no opportunity for such an investigation to take place in this case, and the lack of opportunity is due to the actions of government officials. The affidavits of Mr. Mark Kempton, petitioner's counsel in his Missouri Rule 27.26 proceedings, and Mr. David Howard, petitioner's counsel in his previous habeas corpus petition, are very explicit in this respect.

Mr. Kempton's nine-page affidavit sets forth in detail the conduct of state officials that frustrated his attempt to conduct a diligent investigation into the constitutionality of Mr. Schlup's conviction and sentence. The obstacles he encountered include the following:

> 1. Although Mr. Kempton was appointed in late June of 1987, to represent Mr. Schlup, the Missouri Supreme Court issued warrants ordering petitioner's execution on July 21, August 20, October 15, and November 1, 1987, necessitating the preparation of four motions to stay the execution. Each motion required a signed certification from the circuit court judge.

> 2. The state refused to file any responsive pleading, or even assign a prosecutor to the case, or communicate with Mr. Kempton about petitioner's case until October 9, 1987.
>
> 3. On October 30, 1987, while under a warrant of execution for November 1st, Mr. Kempton appeared in the circuit court of Cole County, Missouri, before the Honorable Judge Donald E. Dalton, and attempted to make a record detailing the events prior to that date and requesting a continuance for the purpose of conducting additional investigation. The request for a continuance was denied, and in an in chambers conference on that morning, the circuit court judge told Mr. Kempton that if he did not proceed, he would be held in contempt and sent to jail, and other counsel would be appointed and forced to conduct the hearing as scheduled that morning.

See Mr. Kempton's affidavit, Exhibit 1C.

Mr. Kempton states that "because of the aforementioned events, I was precluded from performing my duties as described in Rule 27.26 of conducting a diligent investigation into claims that could have been reasonably discovered." (Affidavit, p. 9). Mr. Kempton explains in his affidavit that he has extensive experience in representing clients in felony criminal litigation and civil litigation in Missouri courts, but that he was quite surprised by the circuit court's response to his motion for continuance:

> "Based on years of trial and appellate practice in the State of Missouri, and based upon the amount of time that an attorney can reasonably expect to have to investigate and prepare cases,

> I had no reason to anticipate that in a death penalty case there would be less opportunity to investigate and prepare for the hearing than would be allowed in a typical lawsuit involving far less serious stakes." (Affidavit, p. 8).

At another point he states:

> "As counsel for Mr. Schlup, I fully expected adequate time to research, investigate and prepare my client's defense in this death penalty case, as has been my experience in civil and felony criminal cases that I have been involved with. I was quite surprised by the court's response to the motion for continuance I filed on Mr. Schlup's behalf." (Affidavit, p. 5).

On pages 6, 7 and 8 of his affidavit, Mr. Kempton describes the investigation that he would have performed had he been given an adequate opportunity, i.e. had the circuit court allowed him additional time to conduct discovery and investigation, had the state's counsel communicated with him in a timely fashion, and had his time not been monopolized by the necessity to seek stays of execution at thirty-day intervals during the litigation. He noted that the transcripts of the questioning of inmates by investigators Brooks and Dearixon reveal that several inmates saw the stabbing of Arthur Dade, but "the questioning of the investigators was so shallow that it cannot be determined from their interviews whether these witnesses would have implicated or exonerated Lloyd Schlup." (Affidavit, p. 6). He also describes much of the penalty phase investigation that he would have conducted if given an opportunity, and that in his extensive experience in similar investigations in criminal and civil cases, "it typically requires several months to obtain a

reasonably complete set of medical records." (Affidavit, pp. 6-7).

A factor very closely related to the issuance of numerous execution warrants and the denial of Mr. Kempton's request for continuance is the telephone call that Judge Dalton received from Missouri Supreme Court Chief Justice William J. Billings. Ms. Mary Hudson, then a paralegal with the Missouri State Public Defender's office, has provided this court with an affidavit explaining that Judge Dalton told her that he wanted to withdraw a document that he had signed and submitted to the Missouri Supreme Court certifying that additional time was needed beyond the November 1st execution date to resolve Mr. Schlup's post-conviction motion.[10] Judge Dalton told Ms. Hudson in a telephone conversation on October 23, 1987 that he had received a call from Missouri Supreme Court Chief Justice William Billings not to grant a continuance and to "keep their feet to the fire." Ms. Hudson in her sworn affidavit states that she spoke with both Judge Dalton and Judge Rush, who were very concerned about the call they had received. Judge Dalton expressly stated he would just rather let Judge Billings handle the whole situation regarding stays and hearings. (Hudson Affidavit, p. 2). Although the state has not

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[10] The procedure that was followed in petitioner's Rule 27.26 litigation was that the Missouri Supreme Court would issue a warrant of execution for a certain date, and it would stay that execution only if the circuit judge before whom the case was pending would certify that additional time was necessary to resolve the case. At the same time the Missouri Supreme Court would issue a stay of execution, it would set a new execution date for the near future.

denied that petitioner's continuance motion was resolved in this *ex parte* manner without him or Mr. Kempton having an opportunity to plead his case, petitioner has provided this court additional affidavits of other attorneys, a newspaper article quoting a Kansas City psychiatrist, and has referred the court to a finding of a United States District Judge that Chief Justice Billings engaged in similar conduct in other cases. (See Petitioner's Appendix C, and Petitioner's Suggestions, pp. 42-43, quoting Smith by and through *Smith v. Armontrout*, 632 F. Supp. 503, 507, n.7 (W.D. Mo. 1986)). [Footnote omitted]

The issuance of numerous execution warrants and the denial of Mr. Kempton's motion for continuance are due to circumstances independent of petitioner or his counsel, and were precipitated by the conduct of government officials. Although respondent can be counted on to quote book, verse and chapter on procedural default, respondent seldom acknowledges that the federal court's deference to state judgments that rest on procedural grounds depends upon the state's "*good faith attempts* to honor constitutional rights." *Engle v. Isaac*, 456 U.S. 107, 128 (1982). *(emphasis added)*. The Court also stated " 'in appropriate cases' the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.' " *Murray v. Carrier*, 477 U.S. 478, 495 (1986) (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)). In the circumstances of petitioner's case, it would be just as easy to argue that the conduct of state officials constitutes cause for his failure to discover or fully litigate his constitutional claims at a full and fair hearing in state court. *See e.g., United States ex rel. Gladney v. Peters*, 790 F. Supp.

1364, 1369-1370 (N.D. Ill. 1992), holding that where state supreme court precedent clearly indicates that it would be futile to present a constitutional claim challenging a constitutional defect in a standard jury instruction, the adverse precedent constituted cause which excused the failure of post-conviction counsel to appeal the denial of Gladney's post-conviction motion. In petitioner's case, the cause is even more direct, where the Chief Justice of the State Supreme Court rendered a request for adequate time within which to conduct a reasonable investigation futile by his *ex parte* contact with the state circuit court judge.

* * *

When petitioner filed his petition for writ of habeas corpus in the United States District Court, very little investigation had been done into his guilt or penalty phase defense by either trial counsel or post-conviction counsel. In order to discover and litigate the claims that are presented in this petition, an attorney would have to conduct a diligent investigation, and be prepared to challenged the state court procedures that were used to thwart petitioner's attempt to challenge the constitutionality of his conviction and sentence. Mr. David Howard, who is appointed to represent petitioner in those proceedings, has provided the court with an affidavit very candidly explaining his fear of pursuing the matters set out in the affidavits of Mr. Kempton and Ms. Hudson. Respondent merely states that he cannot comprehend how "a federal habeas counsel may be intimidated by a state court judge during federal habeas corpus proceedings." (Response, p. 7). Mr. Howard's affidavit explains this in direct terms:

I expected retaliation if I used these facts to supply the external factor at that time. I found reasons not to implicate the state judiciary in charges of misconduct, believing that I had sufficient, independent legal grounds to obtain full relief otherwise. My hesitancy stemmed from prior experience in confronting state judges with charges of constitutional infringements of individual rights.

* * *

In 1977 an allegation of professional misconduct was lodged against me by a Missouri circuit court judge after I filed a federal civil rights action challenging his circuit court's practice of incarcerating children in adult jails without lawful procedures. Although I ultimately prevailed with an injunction in the federal suit, I still had to obtain counsel to defend myself in a protracted proceedings before the Missouri Bar Administration. I strongly believe that my client suffered reprisals from the state judges and argued that in the Missouri Supreme Court. Indeed, a judge was finally disciplined for his conduct toward my client, *In the Matter of Buford*, 577 S.W.2d 809 (Mo. banc 1979).

I have also heard lawyers express outrage at the intemperate remarks and unfair treatment they received from Judge Billings. I did not want to join his list of victims by using the information about Judge Billings' overreaching in regard to Schlup's post-conviction relief. In retrospect, my fear of reprisal from this powerful jurist chilled my ability to advance all of Schlup's arguments that could have unleashed meritorious claims from the procedural bar. This fear, coupled with

> the district court's denial of an evidentiary hearing and funding to hire an investigator to pursue facts that may have obviated the need to confront Judge Billings, I believe was fatal to full and fair development of a record during Schlup's 1989 habeas corpus proceeding.
>
> Throughout the course of my representation of Lloyd E. Schlup, he has consistently maintained his innocence. He persisted in attempting to focus counsel's efforts on the guilt phase of his trial.

(Howard Affidavit, pp. 3-5). Indeed, Mr. Howard's fears seem well grounded. Judge Hungate reacted very strongly to the allegations surrounding the Missouri post-conviction proceedings in a manner that was personally critical of counsel. At a conference on petitioner's Rule 60(b) motion, counsel for the state suggested that, in light of Mr. Howard's affidavit, the appropriate remedy (in lieu sparing petitioner's life) to refer Mr. Howard to the Missouri Bar Disciplinarian Committee for appropriate action.

The truth is that Mr. Howard's anxiety about performing the duties necessary to effective [sic] represent Mr. Schlup were the direct results of the unconscionable procedures used by the Missouri courts to deprive Mr. Schlup of a full and fair hearing on his state post-conviction motion. This clearly distinguishes Mr. Schlup's case from those situations referred to in *McCleskey v. Zant, supra*, in which it is deemed to be fair to attribute the negligence of the lawyer to the client.

None of the attorneys who represented petitioner at trial, during state post-conviction, or at his previous

habeas proceeding spoke to any of the witnesses that Mr. Schlup claimed should have been called to testify at his trial. From the beginning, the State of Missouri has characterized these witnesses as "additional alibi witnesses." Although petitioner's defense at trial was alibi, and the defense was strongly corroborated by a videotape made by the dining surveillance camera, it is misleading to characterize these new witnesses as "alibi witnesses." If petitioner had been granted an opportunity to present the testimony of these witnesses, it would become clear that, they would establish petitioner's innocence because they were present at scene of the crime, and could testify that petitioner was not there. There is no question that Robert O'Neal and Rodney Stewart were present at the scene of the crime, and that they could divulge the names of others who were also present. In fact, some of the prisoners who were present at the scene of the crime had already testified in the trials of O'Neal and Stewart before petitioner was brought to trial. Donnie Trendley testified that he saw the stabbing, and that petitioner was not on the walk when the crime took place. He did not see petitioner until he walked into the dining room, and petitioner was already there. (Appendix A, Exhibit 6, p. 3). Mike Riley, John Green and Michael Dunn also testified at previous trials that they saw the stabbing, but they did not see petitioner at the scene of the stabbing.

Interviews of the these readily discoverable witnesses would have revealed the names of additional people who were present and saw the crime. Furthermore, a reading of the statement of Joseph Beck, summarized in respondent's Exhibit T, leads inescapably to the conclusion that he was present, and probably saw the stabbing,

and his protestation that he did not see the stabbing occur is simply the predictable reluctance of a prisoner in a maximum security unit to cooperate with the prison administration in a pending murder investigation. Once it could be determined that a person was present at the scene, regardless of whether that person admits to having seen the murder, a reasonable investigation would require that counsel talk to that person to determine who else may have been present. Had that been done, then counsel would have discovered that Emitt Nave, Stanley Price, Dave Corcoran, Darnell Duckette and Jack Babcock, as well as Joseph Beck, witnessed the murder and could exonerate petitioner. Because no one contacted any of these witnesses, petitioner's *pro se* claim that counsel was ineffective for failing to call witnesses who could prove that he was not present at the scene of the crime, and naming Robert O'Neal, Rodney Stewart, Lamont Griffin-Bey and Ricky McCoy as witnesses who should have been interviewed, was completely misconstrued as merely "an alibi" defense. Even through the last reported opinion on petitioner's previous habeas corpus petition, the court described this claim as being "that trial counsel was ineffective in not calling additional alibi witnesses." *Schlup v. Armontrout*, 941 F.2d 631 (8th Cir. 1991). At this point, when the court made this statement, no witness had been interviewed, and no hearing had been held on this ground. Thus, all prior determinations on this claim, whether on procedural or substantive grounds, have been made in a factual vacuum. Without addressing any of the threshold procedural issues on claims involving evidence of Mr. Schlup's innocence, the Eighth Circuit Court of Appeals went directly to the testimony of Mr. Schlup's

trial counsel at the state Rule 27.26 hearing in which he provided strategy reasons for failing to interview and call Robert O'Neal, Van Robinson, Lamont Griffin-Bey and Ricky McCoy in petitioner's defense. Although Mr. Bushmann stated that he reviewed discovery in trial transcripts before making that decision, Mr. Bushmann was given an opportunity to review the statements and affidavits submitted to this court, some of which are set out in respondent's Exhibit T. After reviewing these materials, Mr. Bushmann provided an affidavit to this court in which he states that:

> "Affiant has never seen or been provided any oral or written statements by any inmate who was present in the housing unit at the time of Arthur Dade's stabbing who admitted to having seen the homicide or who stated that Mr. Schlup was not involved;
>
> Affiant has never seen or been provided by any person any oral or written statement by Lamont Griffin-Bey or Ricky McCoy that he observed the homicide of Arthur Dade or that he had personal knowledge that Mr. Schlup was not involved in the homicide or [sic] Arthur Dade;
>
> The State of Missouri did not advise Affiant, nor was Affiant aware, that Mr. Gary Sonnenberg, Mr. Darnell Duckette and Mr. Jack Babcock made statement to prisoner investigator George Brooks that they had seen the homicide of Arthur Dade." (Affidavit, pp. 1-2).

Mr. Bushmann states that if he had been aware of the existence of these witnesses, he "most certainly would have interviewed them and called them to testify in Mr. Schlup's defense." It is clear that the newly discovered

evidence presented herein completely undercuts the basis for the prior denial of petitioner's petition for relief.

Respondent cites *Williams v. Lockhart*, 862 F.2d 155, 158 (8th Cir. 1988), for the proposition that petitioner must "demonstrate new facts or new legal developments warranting litigation of the claim." (Response, p. 10). In directing the court's attention to this legal standard, respondent completely fails to recognize that petitioner *has* demonstrated new facts and new legal developments warranting litigation of the claims presented herein. The new facts have been extensively discussed in petitioner's Suggestions, and are further discussed below in relation to each particular claim. The legal developments, which respondent completely ignores, are set out in petitioner's Appendix F, which document petitioner's intervening attempts to invoke state remedies that have traditionally been available to persons in his procedural posture and circumstances. These new facts, and the refusal of the Missouri Supreme Court to extend to petitioner the protections of the writ of habeas corpus guaranteed under the Missouri Constitution, art. I, § 12, place this petition in a completely different factual and legal context than the previous petition. Furthermore, in relying upon *Williams v. Lockhart*, 862 F.2d 155, respondent fails to discuss the balance of the holding in that case, in which the court held:

> We agree with *Williams* that it would be unfair to dismiss his "new" claims because they were not included in the prior habeas petition if the previous petition was filed and litigated without his knowledge, participation, or authorization [footnote omitted]. "The concept of 'abuse of the

> writ, is founded on the equitable nature of habeas corpus." (*Citing Kuhlmann v. Wilson*, 477 U.S. 436, 444 (1986)). Rule 9(b) is targeted at those writs that constitute "needless piecemeal litigation," or those whose purpose is to "vex, harass, or delay." [citation omitted] . . . the rule cannot so far as to bar a new application filed by a petitioner who did not in fact consent, either expressly or by implication, to the previous habeas petition filed by his trial counsel. Accordingly, we remand this case and direct the district court to determine whether the "new" constitute an abuse of the writ in light of Williams's now clarified assertion that he did not authorize the first habeas petition. 862 F.2d at 160.

In this case, Mr. Howard filed the amended petition, which the district court denied, without first consulting with petitioner, and without investigating the claims that petitioner specifically requested that he investigate. The observations of Chief Judge Lay in his separate concurring opinion apply directly to petitioner's case:

> I concur in Judge Bowman's excellent opinion. However, under the circumstances of this case, where counsel acted on his own in filing the first habeas petition in federal district court without consultation or advice from petitioner, the discretionary rule of 9(b) governing successive petitions is simply not germane to our consideration. To invoke such a rule would in my judgment necessarily create a procedural callousness and ignore equitable principles relating to habeas corpus. 862 F.2d at 161.

Mr. Howard has admitted that he did not meet with petitioner before amending the habeas corpus petition,

and that he never conducted the investigation that petitioner specifically requested that he do. Judge Lay's observations apply directly to petitioner:

> To suggest that prisoners might hold back to play procedural games with the court is unrealistic. I have never been aware of such prisoner stratagem in a habeas case. In sounds good in principle as a means of thwarting the undesirability of piecemeal appeals, but it simply does not happen. There is no empirical evidence that it occurs. The presumptive desirability to achieve one's freedom is far too great to "sandbag" the court for procedural fun. 862 F.2d at 161.

Judge Lay's observations accurately describe Mr. Schlup's position and conduct throughout this litigation. He is completely without fault for any the circumstances that have resulted in the previous unreliable adjudications of the constitutionality of his conviction and sentence.

In making his conclusory argument that petitioner has not demonstrated actual innocence that would overcome the procedural barriers that respondent has asserted, respondent relies on a passage from *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), as cited in *Cornman v. Armontrout*, 959 F.2d 727 (8th Cir. 1992):

> "In order to establish actual innocence, the court held that a petitioner:
>
> > must show a fair probability that in light of all the evidence, *including that alleged to have been illegally admitted* (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial,

> the trier of facts would have entertained a reasonable doubt of his guilt."

Kuhlmann v. Wilson, 477 U.S. 436, 455 n.17 (1986) and *Cornman v. Armontrout*, 959 F.2d at 730 (Respondent's emphasis). After acknowledging this legal standard, respondent completely fails to answer the allegations that petitioner has made regarding the unreliability of the evidence that was introduced against him at trial. Respondent completely fails to deny the numerous inconsistencies in the state's case, discussed in detail in petitioner's Suggestion, pages 8-20. In fact, the only reference that respondent makes to the strength of the evidence at trial is to argue that it was a reasonable trial strategy for trial counsel to base his entire defense on the inconsistencies of the state's case-in-chief:

> Counsel extensively cross-examined Roger Flowers during trial [citation omitted]. Counsel further attempted to discredit the statements of John Maylee by establishing contradictions between Flowers' and Maylee's testimony (Tr. at p. 490). Counsel further testified at petitioner's Rule 27.26 evidentiary hearing that he was aware of Maylee's and Flowers' testimony presented at the co-defendant's and determined the best strategy was to discredit their testimony by establishing the contradictions.

(Response, p. 16). Aside from admitting the existence of inconsistencies and contradictions, respondent makes no other attempt to address the weakness of the state's case at trial. Respondent also fails to deny that trial counsel failed to use the *additional* impeachment material that could have been used to further diminish the credibility

of the state's witnesses. (See Petitioner's Suggestions, pp. 24-31).

It is difficult to imagine a more compelling "colorable claim of factual innocence" that than presented in this case. Petitioner contends that this preliminary discussion of the evidence clearly entitles him to an evidentiary hearing and a merits ruling on the constitutional violations that he has presented this court in his petition for writ of habeas corpus. While respondent made very little effort to deal with petitioner's claims individually in his response, petitioner will briefly address each individual claim below.

* * *

WHEREFORE, petitioner prays this court to grant an evidentiary hearing on the allegations herein, and thereafter issue the writ of habeas corpus and grant further relief that the court may deem just and proper.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MISSOURI
EASTERN DIVISION

(Caption Omitted In Printing)

Case No. 4:92CV00443 JCH

(Filed June 7, 1993)

SUPPLEMENTAL MOTION FOR EVIDENTIARY HEARING

COMES NOW Petitioner, by counsel, and moves this Court for an evidentiary hearing on his Petition for Writ of Habeas Corpus, and on the procedural issues relating thereto. For his motion, Petitioner states:

1. Petitioner has filed with this Court a Petition for Writ of Habeas Corpus raising numerous issues of fact, including the fact of his innocence, the fact that there is substantial mitigating evidence that should have been presented to the sentencer, and the fact that there is cause for his inability to discover or litigate these questions during his state post-conviction proceedings and his previous Petition for Writ of Habeas Corpus. All of these facts can be established through the testimony of first-hand witnesses, including the fact of Petitioner's innocence.

2. The claims set out in the Petition for Writ of Habeas Corpus were duly presented to the Missouri Supreme Court in a Petition for Writ of Habeas Corpus pursuant to Missouri Rule 91, Chapter 532 of the Missouri Revised Statutes, and Article I, section 12 of the Missouri Constitution.

3. The Missouri Supreme Court denied Petition a full and fair hearing on any of his claims. Indeed, the

Missouri Supreme Court did not provide Petitioner any form of hearing at all. Instead, the Court summarily denied Mr. Schlup's petition without making any findings of fact or conclusions of law, even though Petitioner alleged sufficient facts under Missouri law to invoke the Habeas Corpus jurisdiction of the court.

4. Petitioner has submitted numerous affidavits of witnesses whose testimony establishes his innocence, and this testimony is corroborated by a video tape taken by a prison surveillance camera. Although the video was shown to the jury at trial, additional information has been discovered that now makes the video conclusive proof of Petitioner's innocence. This testimony falls into two categories: (1) Eyewitnesses to the stabbing who establish that Petitioner was not at the scene, and (2) Eyewitnesses to events that prove that events captured on the video tape fix a time frame for the commission of the stabbing that makes it impossible for Petitioner to have been present at the scene. This category of evidence includes the statement of inmate clerk Joe Green made *before* the discovery of the video tape that he alerted the prison control center to the assault on Arthur Dade *as the assault was happening*. It also includes the affidavits of several prisoners who heard the commotion on the cell block, and *simultaneously* saw guards running from the direction of the dining room toward the cell block. Since the video tape shows that Mr. Schlup was standing outside the dining room for some time before the guards ran out in response to the call, he could not have been involved in the fight. Counsel will be submitting in the near future a supplemental motion to expand the record,

which will include the affidavits of several new witnesses to these events.

5. Counsel has attempted to reconstruct the occupancy of Housing Unit 5 on the date of the stabbing, and is attempting to locate as many of the potential witnesses as is humanly possible. This would have been a relatively simple task at the time of trial, but it is somewhat difficult and time consuming at this point, although it can be done. This has been a labor-intensive and time-consuming process, and is not yet complete.

6. Counsel is aware of the State's desire to expedite this case, and suggests that the most effective manner in which to comply with the recommendation of the Eighth Circuit Court of Appeals in *Rust v. Clark*, 960 F.2d 72, 73 (8th Cir. 1992), is to follow the procedures set out in Eastern District Local Rule 13(B) regarding scheduling and planning of complex civil cases. This matter is equally (if not more) important to Counsel's client, and Counsel has done his best to give this case the priority it deserves, given Counsel's other professional obligations to other clients and other matters. In the next 60 days, counsel has a traverse due in a death penalty habeas corpus case in the Western District of Missouri, and will be relocating his offices. Counsel was recently appointed in another death penalty habeas corpus case in the Eastern District of Missouri which Respondent also wishes to have expedited, and was personally assigned by the State Public Defender to represent a death-sentenced prisoner in a state Rule 29.15 motion, which involves rigid and jurisdictional time limits. Counsel respectfully suggests that the best way to avoid chaotic litigation in this case is

to set a schedule that accounts for the other demands on the time and resources of the parties.

WHEREFORE, Petitioner moves this court for:

A. An evidentiary hearing on his Petition for Writ of Habeas Corpus;

B. An opportunity to discuss with the court and opposing counsel the scheduling of an evidentiary hearing;

C. An opportunity to appear in person before the Court and formally argue the merits of Petitioner's motions now pending before this Court;

D. Such other relief as the Court deems just and equitable.

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Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Caption Omitted In Printing)

Case No. 4:92CV00443 (JCH)

RESPONDENT'S SUGGESTIONS IN OPPOSITION TO PETITIONER'S MOTION FOR EVIDENTIARY HEARING

Comes now respondent, by and through counsel, and states as follows in opposition to petitioner's motion for evidentiary hearing.

Petitioner filed his third petition for writ of habeas corpus with this court on March 11, 1992. *See Blair v. Armontrout*, 976 F.2d 1130, 1134 (8th Cir. 1992) (treating Rule 60(b) motion as functional equivalent of second petition), *cert. denied*, 113 S.Ct. ___ (May 17, 1993). Petitioner's third petition raises claims of newly discovered evidence of actual innocence. Petitioner requests an evidentiary hearing to present testimony on his newly discovered evidence. In support of his request for evidentiary hearing, petitioner claims he is entitled to a hearing because he raised this issue in a state habeas corpus proceeding under Missouri Supreme Court Rule 91 and the Missouri Supreme Court summarily denied this issue his petition. Since petitioner has defaulted on his available state remedies on this claim, and because the claim is not reviewable as a matter of law, petitioner is not entitled to an evidentiary hearing.

Newly discovered evidence is not reviewable, as a matter of law, in a federal habeas corpus proceeding. *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). Nor is a claim of newly discovered evidence of

actual innocence. *See Herrea* [sic] *v. Collins*, 506 U.S. ___, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). In fact, *Herrera* held that newly discovered evidence of actual innocence are more appropriate for presentation in a request for executive clemency. *Id.* at 869. Since a claim of newly discovered evidence of actual innocence is not reviewable as a matter of law, petitioner's factual dispute need not be resolved.

Moreover, the Missouri Supreme Court's summary denial of petitioner's petition for writ of habeas corpus does not entitle petitioner to an evidentiary hearing in federal court. Petitioner's claim of newly discovered evidence of actual innocence was not raised within fifteen days after the verdict was returned. Missouri Supreme Court Rule 29.11(f); *Herrera v. Collins, supra*, 113 S.Ct. at 865 n.8. Petitioner's failure to raise this claim within fifteen days has resulted in petitioner defaulting on his available state remedies. *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 436 (1986); *Gilmore v. Delo*, 909 F.2d 385 (8th Cir.), *cert. denied*, 111 S.Ct. 20 (1990).

Although petitioner raised this claim to the Missouri Supreme Court in a petition for writ of habeas corpus, the Missouri Supreme Court denied petitioner's petition because claims of newly discovered evidence are not reviewable in a habeas corpus proceeding under Rule 91 was a matter of law. *Cf. State v. Johnson*, 286 S.W.2d 787, 795-96 (Mo. 1956) (affidavits of actual innocence "can only be presented in an action for executive clemency").

The summary denial of petitioner's petition for writ of habeas corpus does not remove the procedural default which occurred by failing to raise the claim within fifteen

days after the verdict. *See Byrd v. Delo*, 942 F.2d 1226, 1231-1232 (8th Cir.), *stay denied*, 112 S.Ct. 17 (1991); *Daniel v. Jones*, 944 F.2d 429, 430 (8th Cir. 1991). Therefore, although petitioner may have presented his claim of newly discovered evidence of actual innocence to the Missouri Supreme Court pursuant to a habeas corpus proceeding under Rule 91, the summary denial of this claim does not establish that he was denied a full and fair hearing in state court entitling him to an evidentiary hearing in federal court.

Furthermore, since petitioner's third petition for writ of habeas corpus is an abuse of the writ, this Court must resolve this "threshold" issue. *McCleskey v. Zant*, 499 U.S. ___, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). Any holding that petitioner is entitled to an evidentiary hearing in federal court on his claims of newly discovered evidence of actual innocence would also be barred under the retroactivity rules of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 104 L.Ed.2d 334 (1989).

Conclusion

WHEREFORE, for the reasons herein stated, respondent prays that this Court deny petitioner's motion for an evidentiary hearing.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Caption Omitted In Printing)

Case No. 4:92CV00443 JCH

(Filed June 14, 1993)

SUPPLEMENTAL MOTION TO EXPAND THE RECORD

COMES NOW, petitioner, Lloyd Schlup, and respectfully moves this Court, pursuant to Rule 7 of the Rules Governing § 2254 Cases, to expand the record in this case by allowing petitioner to file additional affidavits in support of his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. sec. 2254. For his motion, Petitioner states:

1. Counsel has submitted herewith the affidavits of eight witnesses who have personal knowledge of facts that establish Mr. Schlup's innocence of the crime for which he has been sentenced to death. Attached hereto are the affidavits of the following individuals: Lamont Griffin Bey, Jack Babcock, Gary Sonnenberg, James Pierce, William Foster, Charles Ward, Donnell White, and Emmett Nave.

2. Affidavits of witnesses Griffin Bey, Nave, Babcock and Sonnenberg have already been submitted to this court. Counsel personally interviewed these witnesses, and obtained supplemental affidavits to address respondent's allegation that their previous affidavits that have been submitted to this court do not clearly establish petitioner's innocence or are not sufficiently detailed to be credible. Although counsel disagrees with respondent's characterization of the prior affidavits, counsel

believes that the supplemental affidavits adequately address this concern.

3. Foster, Pierce, Ward and White are witnesses who had not previously been interviewed, but they possess personal knowledge that substantiate petitioner's innocence. Each witness' affidavit indicates either that he saw the stabbing and Mr. Schlup was not involved, or that he saw prison guards running from the direction of the dining room toward the cell block and simultaneously heard the noise caused by the fight during which Dade was were [sic] stabbed. In conjunction with the videotape showing Mr. Schlup in the prison dining room as the guards rushed to the scene of the stabbing, these affidavits conclusively establish Mr. Schlup's innocence.

4. Counsel's investigation has revealed that there may be additional witnesses who were in a position to observe events relevant to petitioner's guilt or innocence. Counsel is diligently attempting to locate and interview these individuals, and expects to provide additional information to the court.

5. Counsel also intends to file additional exhibits with the court, including the floor plan of Housing Unit 5 (which by agreement will be filed under seal), and the videotape from the prison surveillance camera.

6. Consideration of the facts and testimony set out in the attached affidavits are critical to a just resolution of this cause.

WHEREFORE, petitioner respectfully moves that this court grant leave to expand the record herein to include the affidavits attached hereto, and for such other relief as the Court deems appropriate.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Caption Omitted In Printing)

Case No. 4:92CV00443 (JCH)

RESPONDENT'S SUGGESTIONS IN OPPOSITION TO PETITIONER'S MOTION TO EXPAND THE RECORD

Comes now respondent, by and through counsel, and states as follows in opposition to petitioner's motion to expand the record.

Petitioner filed his third petition for writ of habeas corpus with this Court on March 11, 1992. *See Blair v. Armontrout*, 976 F.2d 1130, 1134 (8th Cir. 1992) (treating Rule 60(b) motion as functional equivalent of second petition), *cert. denied*, 113 S.Ct. ___ (May 17, 1993). Petitioner's third petition raises claims of newly discovered evidence of actual innocence. Petitioner requests to expand the record by submitting eight affidavits from inmates who allege petitioner is actually innocent. Since petitioner has defaulted on his available state remedies on this claim, and because the claim is not reviewable as a matter of law, petitioner's motion to expand the record should be denied.

Newly discovered evidence is not reviewable, as a matter of law, in a federal habeas corpus proceeding. *Townsend v. Sain*, 732 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). Nor is a claim of newly discovered evidence of actual innocence. *See Herrera v. Collins*, 506 U.S. ___, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). In fact, *Herrera* held that newly discovered evidence of actual innocence are more appropriate for presentation and request for executive clemency. *Id.* at 869. Since a claim of newly discovered

evidence of actual innocence is not reviewable as a matter of law, petitioner's request to expand the record by submitting affidavits from inmates who allege that petitioner is actually innocent is not necessary in order for this Court to resolve petitioner's claim.

28 U.S.C. §2254, Rule 7(a) states that a court may expand the record by including "materials relevant to the determination of the merits of the petition." Since newly discovered evidence of actual innocence fails to plead a claim for which a ground for relief may be granted, the affidavits are unnecessary to rule on the issue presently before this court.

Furthermore, petitioner did not raise this claim in the state courts. Thus, petitioner has defaulted on his available state remedies. *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 97 L.Ed.2d 436 (1986); *Gilmore v. Delo*, 908 F.2d 385 (8th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 20, 111 L.Ed.2d 826 (1990); *Stokes v. Armontrout*, 893 F.2d 152 (8th Cir. 1989), *stay denied*, 495 U.S. 926, 110 S.Ct. 2162, 109 L.Ed.2d 492 (1990). Petitioner may not present additional evidence in federal court if that evidence has not been presented in state court. *Bolder v. Armontrout*, 921 F.2d 1359, 1362 (8th Cir. 1990), *cert. denied*, 112 S.Ct. 152 (1991), citing *Thomas v. Zant*, 697 F.2d 977, 988 (11th Cir. 1983) ("additional evidence federal court not allowed unless petitioner shows failure to present evidence to state court was not due to excusable neglect or deliberate bypass"); *see also Keeney v. Tamayo-Reyes*, ___ U.S. ___, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992). Petitioner's failure to present this evidence in state court prohibits petitioner from presenting this evidence in a federal habeas corpus proceeding.

Conclusion

WHEREFORE, for the reasons herein stated, respondent prays that this Court deny petitioner's motion to expand the record.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LLOYD SCHLUP, Petitioner,	)	Cause No. 4:92CV00443
v.	)	(Filed August 23, 1993)
PAUL DELO, Superintendent Potosi Correctional Center, Respondent.	)	

MEMORANDUM AND ORDER

This matter is before the Court pursuant to Lloyd Schlup's Petition for Writ of Habeas Corpus. Also pending before the Court are Petitioner's Supplemental Motion for Evidentiary hearing, Petitioner's Supplemental Motion to Expand the Record and Respondent's Motion to Vacate Stay of Execution.

I. Background

On March 3, 1986, Petitioner Lloyd Schlup was convicted of the capital murder of Arthur Dade and sentenced to death by the St. Charles County Circuit Court. The murder took place on 1 Walk of Housing Unit 5-A of the Special Management Unit of the Jefferson City Correctional Center (JCCC)[1]. At the time of the murder, Petitioner and Arthur Dade were inmates at JCCC. In

[1] At the time of the murder, JCCC was known as the Missouri State Penitentiary.

separate trials, Robert O'Neal and Rodney Stewart were also convicted of the murder of Arthur Dade. *State v. O'Neal*, 718 S.W.2d 498 (Mo. banc 1986); *State v. Stewart*, 714 S.W.2d 724 (Mo. Ct. App. 1986).

Petitioner unsuccessfully appealed his conviction in state court. *State v. Schlup*, 724 S.W.2d 236 (Mo. banc 1987), *cert. denied* 482 U.S. 920 (1987). Petitioner also filed a motion for post-conviction relief pursuant to Missouri Supreme Court Rule 27.26 (repealed 1988). The motion court denied relief and the Missouri Supreme Court affirmed. *Schlup v. State*, 758 S.W. 2d 715 (Mo. banc 1988). Petitioner subsequently filed a petition for writ of habeas corpus in federal court. The court denied the petition. *Schlup v. Armontrout*, No. 89-0020-C-3 (E.D. Mo. November 21, 1989) (unpublished opinion), *aff'd*, 941 F.2d 1062 (8th Cir. 1991), *cert. denied* 112 U.S. 1273 (1992). Immediately after his petition for writ of certiorari was denied by the United States Supreme Court, Petitioner filed a Motion for Reconsideration of the Judgment pursuant to Fed. R. Civ. P. 60(b)(6). The district court denied the Rule 60(b)(6) Motion on the ground that Petitioner's successive claims were untimely filed and Petitioner's new claims were best raised in a petition for writ of habeas corpus. *Schlup v. Armontrout*, No. 89-0020-C-3

(E.D. Mo. March 10, 1992)(unpublished opinion). Petitioner filed the instant petition on March 11, 1992.

Petitioner asserts the following seven claims in support of his petition: (1) Petitioner has newly discovered evidence that establishes his innocence of the murder; (2) trial counsel was ineffective because the failed to interview or call as witnesses several individuals who could

have testified that Petitioner was not present at the scene of the murder; (3) trial counsel was ineffective because he failed to investigate, rebut and object to the testimony of the state's key witnesses; (4) the prosecution failed to disclose material exculpatory evidence concerning Petitioner's involvement in the murder; (5) trial counsel failed to conduct a reasonable investigation into Petitioner's background and mental health; (6) trial counsel was ineffective because he failed to conduct an investigation into the facts and circumstances of the aggravating circumstances presented during the penalty phase of the trial; and (7) the prosecution failed to disclose exculpatory evidence concerning the aggravating circumstances. Claims 1, 3, 4, 6, and 7 are raised for the first time in the instant petition. [Hereinafter collectively referred to as "the new claims."] Claims 2 and 5 were raised in Petitioner's first habeas petition. [Hereinafter collectively referred to as "the successive claims."]

II. The New Claims

A. Standard

The majority of Petitioner's claims are raised for the first time in this petition. The Court may not consider claims raised for the first time in a successive habeas petition if the petitioner has "deliberately withheld the newly asserted ground or otherwise abused the writ." 28 U.S.C. § 2244(b). *See also* Rules Governing Section 2254 Cases in the United States District Courts, Rule 9(b). The Court may consider new claims raised in a successive petition if the petitioner can establish cause for not previously raising the claims and prejudice from his failure to

do so. *McCleskey v. Zant*, 111 S.Ct. 1454, 1470 (1991); *Shaw v. Delo*, 971 F.2d 181, 184 (8th Cir. 1992). To establish cause the petitioner must show that " 'some objective factor external to the defense impeded counsel's efforts' " to raise the claim in the first petition. *McCleskey*, 111 S.Ct. at 1454, 1470 (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).

Claims that are barred by the cause and prejudice standard may be heard if Petitioner "can show that a fundamental miscarriage of justice would result from a failure to entertain the claim." *Id.* The scope of the fundamental miscarriage of justice exception is narrow. *Sawyer v. Whitley*, 112 S. Ct. 2514, 2519 (1992); *Nolan v. Armontrout*, 973 F.2d 615, 617 (8th Cir. 1992). In *Sawyer*, the Supreme Court announced that the miscarriage of justice exception applies when the petitioner establishes by "clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Sawyer*, 112 S.Ct. at 2517. The same standard also applies to habeas challenges to the conviction itself. *McCoy v. Lockhart*, 969 F.2d 649 (8th Cir. 1992). *See also Shaw v. Delo*, 971 F.2d 181, 185-86 (8th Cir. 1992); *Cornell v. Nix*, 976 F.2d 376, 381 (8th Cir. 1992)(en banc).

B. Cause

The government bears the burden of pleading abuse of the writ. *McCleskey*, 111 S.Ct. at 1470. Respondent in the instant case has set forth Petitioner's writ history, identified the new claims in the instant petition and alleged that petitioner has abused the writ with respect to

those new claims. Thus, Respondent has satisfied his burden and the burden shifts to Petitioner to show cause for failing to raise Claims 1, 3, 4, 6, and 7 in his previous petition and prejudice resulting from his failure to do. *See id.*

Petitioner asserts three theories in support of his contention that he had cause for failing to raise Claims 1, 3, 4, 6, and 7 in his previous petition. First, Petitioner asserts that his counsel failed to permit him to participate in the litigation of his first petition. Second, Petitioner contends that the conduct of former Missouri Supreme Court Justice Billings intimidated his Rule 27.26 counsel and his first habeas counsel and prevented them from thoroughly investigating and presenting Petitioner's claims. Finally, Petitioner asserts that the State failed to disclose exculpatory evidence. None of these theories is persuasive.

Petitioner maintains that he was denied a meaningful opportunity to participate in the litigation of his first habeas petition.[2] Specifically, Petitioner contends that although he included the names of all known exculpatory witnesses in his *pro se* petition[3] and in his Rule 27.26 motion, no lawyer ever contacted these witnesses. Petitioner also states that his mother maintains a file of

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[2] Insofar as Petitioner contends that this failure was due to conduct of Justice Billings, the Court's discussion in Section II.A.ii. of this Memorandum and Order, *infra*, applies.

[3] Petitioner filed his first petition for writ of habeas corpus *pro se*. The court appointed counsel to represent Petitioner and granted Petitioner's appointed counsel leave to file an amended petition.

documents concerning her son's case and that she has been frustrated in her attempts to have counsel pursue her suggested avenues of investigation.

In support of his contention that this alleged conduct constitutes cause, Petitioner cites *Williams v. Lockhart*, 862 F.2d 155 (8th Cir. 1988). In *Williams*, petitioner alleged that his trial counsel filed and litigated his first habeas petition without petitioner's knowledge or participation. *Id.* at 159. The court of appeals remanded the case to the district court for a determination of whether petitioner had consented to the previous habeas petition. The court stated:

> This is a critical question of fact, for Williams should not be allowed to accept [the attorney's] representation and then later disavow it. Conversely, he should not be bound by what [the attorney] did unless he somehow authorized or ratified [the attorney's] efforts on his behalf.

Id. A petitioner may consent to the actions of his attorney either expressly or by implication. *Id.*

In the instant case, Petitioner does not allege that the attorney who filed his first habeas petition acted without his knowledge or participation. Therefore, the reasoning of *Williams* is not applicable here. Nor can this element of Petitioner's argument succeed under the assumption that Petitioner has alleged that his habeas counsel was ineffective. Because there is no constitutional right to counsel in a habeas case, the ineffectiveness of habeas counsel does not constitute cause. *Coleman v. Thompson*, 111 S.Ct. 2546, 2567-68 (1991); *Nolan v. Armontrout*, 973 F.2d 615, 617 (8th Cir. 1992).

Petitioner also maintains that Justice Billings contacted the Circuit Judge presiding over Petitioner's Rule 27.26 hearing and ordered him to deny all requests for extensions of time. In addition, Petitioner maintains that the Missouri Supreme Court issued numerous execution warrants against Petitioner during the pendency of his state post-conviction motion thereby requiring Petitioner's Rule 27.26 counsel to spend his time preparing motions for stay of execution rather than investigating Petitioner's case. Petitioner submits several affidavits in support of his contention that Justice Billings regularly admonished circuit judges presiding over capital cases not to entertain delays or grant continuances.

Assuming that Petitioner's allegations are correct, the Court finds that they do not constitute cause for Petitioner's failure to raise Claims 1, 3, 4, 6, and 7 in his previous habeas petition. The alleged difficulties encountered by Petitioner's state post-conviction relief counsel do not explain Petitioner's failure to include his new claims in his first federal habeas petition. Obviously, Justice Billings had no jurisdiction over the judge presiding over the federal habeas case. Nor does Petitioner allege that Justice Billings attempted to interfere with the federal habeas proceedings. By affidavit Petitioner's first federal habeas counsel states that he was reluctant to raise the issue of Justice Billings' conduct in the first federal habeas petition because he had previously experienced reprisals from state court judges after criticizing their conduct. The Court finds, however, that counsel's reluctance to risk the wrath of Justice Billings does not constitute an objective factor external to the defense and

therefore cannot constitute cause for Petitioner's failure to raise his new claims in his previous petition.

Petitioner maintains that state officials interfered with his ability to raise the new claims in his previous petition because they had exculpatory evidence in their possession and failed to disclose said evidence to Petitioner. In the portion of Petitioner's Suggestions addressing the merits of his constitutional claims, Petitioner develops his contention that the alleged withholding of this evidence interfered with his constitutional rights at the trial phase. However, Petitioner never develops his claim that the alleged failure to disclose exculpatory evidence to his trial counsel interfered with his ability to present all of his claims in his first habeas petition. Thus, the Court finds that these allegations do not constitute cause under the standard enunciated in *McCleskey*.

For all of the foregoing reasons, the Court concludes that Petitioner has not shown cause for his failure to raise his new claims in his prior habeas petition. Because Petitioner has not shown cause for failing to raise Claims 1, 3, 4, 6, and 7 in his previous petition, the Court need not consider whether he would be prejudiced by his inability to raise them in the instant case. *McCleskey*. 111 S.Ct. at 1474.

C. Miscarriage of Justice Exception

As previously noted, the Court must consider Petitioner's new claims if Petitioner establishes by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found him guilty of the

murder of Arthur Dade or eligible for the death penalty under Missouri law.

Claim 1

Petitioner claims that his continued incarceration and imposition of the death penalty violate the due process clause of the Fourteenth Amendment because Petitioner has obtained newly discovered evidence that establishes his innocence. In addition, Petitioner claims that his execution would violation [sic] the Eighth Amendment ban on cruel and unusual punishment because it is unconstitutional to execute an innocent person.

The Court may only consider newly discovered evidence in a habeas proceeding when the evidence is directly relevant to the constitutionality of the petitioner's continued incarceration. *Townsend v. Sain*, 372 U.S. 293, 317 (1963); *Herrera v. Collins*, 113 S.Ct. 853, 860 (1993). "[T]he existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." *Townsend*, 372 U.S. at 317.

In the instant case, Petitioner maintains that the evidence is relevant to his claim that the execution of an innocent person would violate the Eighth and Fourteenth Amendments to the United States Constitution and therefore should be considered. Petitioner relies heavily on his claim of actual innocence and he submits as new evidence in support of that claim the affidavits of inmates who

assert that they witnessed the murder of Arthur Dade and did not see Petitioner at the scene.[4]

The Supreme Court has recently considered whether actual innocence is an independent ground for federal habeas corpus relief. *Herrera, supra.* Petitioner in *Herrera* claimed that he was scheduled to be executed for a murder he did not commit. Writing for the Court, Justice Rehnquist noted that actual innocence is not an independent constitutional claim but, rather, "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 862. *See also id.* at 869. However, the Court also stated:

> We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the

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[4] In his Supplemental Motion to Expand the Record, Petitioner seeks leave to introduce additional affidavits. The Court has reviewed those affidavits and concludes that although they are more detailed than the previously submitted affidavits, they do not change the Court's analysis of Petitioner's actual innocence claim. Therefore, Petitioner's Motion to Expand the Record will be denied.

> threshold showing for such an assumed right would necessarily be extraordinarily high.

Id. at 869. Thus, it is appropriate for the court to consider whether Petitioner has made a persuasive showing of actual innocence.

Herrera supported his claim of actual innocence with affidavits wherein the affiants asserted that Herrera's since deceased brother committed the murder. The Court held that the affidavits were not sufficient to warrant relief on Petitioner's actual innocence claim. The Court noted that the affidavits were filed over eight years after petitioner's trial and stated that "there is something suspect about a defense witness who is not identified until after the 11th hour has passed." *Id.* at 869 (quoting *Taylor v. Illinois*, 484 U.S. 400 (1988)). *See also Bolder v. Delo*, 985 F.2d 941, 943 (8th Cir. 1993)(affidavits filed at the eleventh hour and over twelve years after the state trial are to be treated with skepticism); *Delo v. Blair*, 1993 U.S. LEXIS 4633 (July 21, 1993)(vacating stay of execution imposed by court of appeals even though petitioner submitted seven affidavits in support of his claim of actual innocence). The Court further discredited Herrera's affidavits because all but one of the affidavits consisted of hearsay and the affidavits did not present a consistent account of the murder. *Id.* at 869. The Court also stated that the affidavits must be considered in light of the proof offered at trial. *Herrera*, 113 S.Ct. at 870. Herrera had been convicted of murder on the strength of two eyewitness accounts, numerous pieces of circumstantial evidence and a handwritten note in which Herrera strongly implied that he was responsible for the murder. *Id.* at 872.

The affidavits presented by Petitioner do not suffer from all of the same infirmities that caused the Supreme Court to discredit the affidavits submitted by Herrera. The instant case is also distinguishable from *Herrera* in that Herrera was convicted on the basis of a larger quantity of evidence than was presented at Petitioner's trial. However, upon review of the transcript, Petitioner's new evidence, and the arguments of counsel, the Court finds that Petitioner has failed to make a persuasive showing of actual innocence. The affidavits submitted by Petitioner were all executed in the early months of 1992, approximately six years after Petitioner's state court trial. As previously noted, there is something suspect about affidavits produced after a long delay. *Herrera*, 113 S.Ct. at 872 (O'Connor concurring). Moreover, Petitioner's affiants are all fellow inmates who do not necessarily have a strong incentive to refrain from perjuring themselves. *See Hall v. Lockhart*, 806 F.2d 165, 168 (8th Cir. 1986). Considered in light of the positive identifications made by Officers Flowers and Maylee, the Court cannot say that these affidavits constitute a persuasive showing of actual innocence sufficient to warrant disruption of the state court's finding of guilt.

Claim 3

The States's primary evidence at trial was the eyewitness testimony of Corrections Officers John Maylee[5] and Lt. Roger Flowers. See TR at 234-94; 331-363. Petitioner

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[5] The testimony of John Maylee was presented by deposition.

contends that Flowers and Maylee gave testimony in the trials of Petitioner's codefendants O'Neal and Stewart that was inconsistent with their testimony during Petitioner's trial. In addition, Petitioner maintains that the testimony of Flowers was inconsistent with the testimony of Maylee and that both witnesses offered testimony that was inconsistent with prior sworn statements. Petitioner contends that he was denied effective assistance of counsel because his trial counsel failed to adequately investigate, object to and rebut the testimony of Flowers and Maylee.

In his Suggestions, Petitioner details various inconsistencies between the accounts of the murder given by Officers Flowers and Maylee.[6] Obviously, these discrepancies were before the jury at the time of their deliberations. Moreover, Petitioner's trial counsel emphasized discrepancies between the testimony of Maylee and Flowers in his closing argument. TR. 495-96.

Petitioner also contends that the jury did not have the opportunity to consider certain inconsistencies between Officer Flowers' trial testimony and prior sworn

[6] For example, Officer Flowers testified that he saw Stewart walking toward Dade against the flow of inmates coming out of 1 Walk toward the cafeteria. TR. 242. Officer Maylee testified that he saw O'Neal, Schlup and Stewart running in the same direction. TR. 332.

statements.[7] However, upon review of these inconsistencies, the Court cannot say that they are material to a determination of Petitioner's guilt or innocence such that no reasonable juror would have convicted Petitioner had they been noted at trial.

Finally, Petitioner points to certain inconsistencies between the testimony of Officer Maylee and certain previous statements. According to Petitioner, these inconsistencies render suspect Maylee's contention that he was able to see the murder from his position three levels above the scene of the crime.[8] However, as Petitioner notes, trial counsel did address the visibility issue and "established . . . that Maylee's ability to view the scene from the top floor of the cell block was at least questionable." Suggestions, p. 26 n. 14 (citing TR. 193-205). The jury had the opportunity to consider the credibility of Maylee and to determine whether he was able to see all that he said he was able to see. The Court finds that the evidence relied upon by Petitioner is not so substantial that had it been introduced no reasonable juror would have credited Maylee's testimony.

[7] These inconsistencies concern whether Flowers saw Stewart hitting Arthur Dade in the face or in the stomach and whether Flowers saw Petitioner run toward the back of the hallway after the murder or whether he did not see where Petitioner went after the murder.

[8] The murder took place on 1 Walk of Housing Unit 5-A. 1 Walk is on the first floor of the prison. Maylee was stationed on 7-8 Walk which is on the fourth floor of the prison. Petitioner does not dispute that 1 Walk is visible from certain positions on 7 Walk.

Claim 4

As previously noted, Petitioner claims that the state failed to disclose material exculpatory evidence in its possession. Petitioner states that the prison's chief investigators interviewed Lamont Griffin-Bey and Ricky McCoy, two inmates who claimed to have witnessed the murder. Petitioner contends that when Griffin-Bey and McCoy were shown a photograph of Petitioner the witnesses indicated that Petitioner was not involved in the murder of Arthur Dade. In addition, Petitioner claims that several witnesses testified at the trials of Robert O'Neal and Rodney Stewart that Petitioner was not present at the scene of the murder. Petitioner contends that the state did not provide him with this information and the only information he received was "an incomplete transcript of cursory interviews with several inmates." Suggestions, at 75.

Review of the transcript indicates that Petitioner's trial counsel used portions of the transcript of both the O'Neal and the Stewart trials to impeach the testimony of Officer Flowers. TR. 267; 279; 281. In addition, Petitioner acknowledges that he received transcripts of the witnesses' interviews with prison investigators. Thus, the substance of Claim 3 amounts to an allegation that certain witnesses were shown a photograph of Petitioner and indicated that he was not a participant in the murder of Arthur Dade.

As Respondent notes, Petitioner has submitted the affidavit of Griffin-Bey. In addition, Petitioner has submitted the transcripts of the witnesses' interviews with

prison investigators. The affidavit of Griffin-Bey is dated January 21, 1992. In his affidavit, Griffin-Bey states that he saw the stabbing of Arthur Dade and Petitioner was not involved. He does not state that prison investigators showed him a photograph of Petitioner. Thus, nothing in the record supports Petitioner's contention that the exculpatory evidence Petitioner relies on even exists. Careful review of the interview transcripts submitted by Petitioner does not alter this conclusion.

Claim 6

Petitioner contends that his trial counsel was ineffective because he failed to conduct an investigation into the facts and circumstances of Petitioner's convictions for the assault of cellmate Larry Wickizer and the assault and sodomy of fellow inmate Harold Johnson. Petitioner contends that the assault and sodomy of Harold Johnson occurred when Petitioner was experiencing extreme mental disturbance that caused him to inhale bug spray in order to alter his state of consciousness. Petitioner further states that at his trial for the assault of Larry Wickizer, several witnesses verified Petitioner's contention that the assault was committed in self-defense.

The state introduced evidence concerning the prior convictions during the penalty phase of Petitioner's trial in order to establish that Petitioner had prior serious assaultive criminal convictions and therefore was eligible for the death penalty. *See* Mo. Rev. Stat. § 565.032.2(1). The state also relied on the fact that Petitioner was incarcerated at the time of the murder. Mo. Rev. Stat. § 565.032.2(9). Assuming for the sake of argument that

trial counsel was ineffective for failing to conduct an investigation into the circumstances of Petitioner's prior assault convictions, the Court cannot say that in the absence of this constitutional error no reasonable juror would have found Petitioner eligible for the death penalty. Where the jury finds more than one statutory aggravating circumstance, the subsequent failure of one circumstance does not invalidate the other. *Mercer v. Armontrout*, 844 F.2d 582, 584 (8th Cir. 1988)(en banc); *State v. La Rette*, 648 S.W.2d 96, 102 (Mo. banc.), *cert. denied*, 464 U.S. 908 (1983). Therefore, even assuming that the jury might have viewed the prior assaults in a different light had trial counsel more thoroughly investigated the circumstances surrounding those assaults, a reasonable juror could nonetheless have found Petitioner eligible for the death penalty.

Claim 7

Petitioner states that the government knew and failed to disclose that several witnesses had testified in support of Petitioner's defense of self-defense at his trial for the assault of Larry Wickizer. Evidence concerning Petitioner's conviction for the assault of Larry Wickizer was introduced in the penalty portion of Petitioner's trial. Because Petitioner's conviction for the assault of Larry Wickizer was only relevant in establishing one of two statutory aggravating circumstances, the analysis set forth immediately above applies to this claim as well.

III. Successive Claims

In his first habeas petition, Petitioner claimed, *inter alia*, that trial counsel was ineffective because he failed to investigate or call additional witnesses[9] and because he failed to introduce psychological or psychiatric testimony as mitigating evidence. The district court held that these claims were procedurally barred due to Petitioner's failure to raise the issues in state court. The court held that the ineffectiveness of post-conviction counsel could not constitute the cause necessary to excuse the procedural default. The Eighth Circuit subsequently announced that the ineffectiveness of post-conviction counsel can excuse a procedural default. Because the record did not contain the evidence necessary to determine whether appellate counsel or post-conviction counsel were ineffective, the court of appeals bypassed the procedural bar issue and addressed Petitioner's claims on the merits. *Schlup v. Armontrout*, 941 F.2d 631 (8th Cir. 1991). The court held that trial counsel was not ineffective for failing to call the additional witnesses because their testimony would be either damaging or repetitive. *Id.* at 639. With respect to Petitioner's claim concerning mitigating psychological or psychiatric evidence, the court held that the undeveloped evidence "would not with 'reasonable probability' have

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[9] Petitioner raised the claim with regard to the following witnesses: Robert O'Neal, Van Robinson, Lamont Griffin and Ricky McCoy. In his current petition, Petitioner reasserts this claims [sic] with respect the aforementioned persons and also includes the trial attorney's failure to interview and call as witnesses the following individuals: Donnie Trendley, Michael Riley, Michael Dunn and John Green.

been likely to change Schlup's sentence." *Id.* (citing *Strickland v. Washington*, 466 U.S. at 694, 699-700).

As a general rule, courts may not consider the merits of claims raised in a previous habeas petition when those claims were determined on the merits. *Sawyer v. Whitley*, 112 S.Ct. 2514, (1992); *Kuhlmann v. Wilson*, 477 U.S. 436 (1986). However, the court may address successive claims when the ends of justice so require. *Sawyer*, 112 S.Ct. 2519; *Kuhlmann*, 477 U.S. at 454. This exception is governed by the actual innocence standard announced in *Sawyer*. See *Sawyer*, 112 S.Ct. at 2518-19.

Claim 2

Petitioner contends that counsel was ineffective for failing to interview and call as witnesses certain inmates who claim to have seen the murder of Arthur Dade and who state that Petitioner was not involved. Certainly these affidavits constitute probative evidence that may or may not have swayed the jury had they been presented at trial. However, in view of the countervailing evidence that was presented, the Court cannot say that even upon consideration of all of the materials currently in the record no reasonable juror would have voted to convict Lloyd Schlup of the murder of Arthur Dade.

Claim 5

Petitioner contends that his trial counsel was ineffective in that he failed to conduct a reasonable investigation into Petitioner's background and mental health. Petitioner maintains that a reasonable investigation into these

matters would have disclosed substantial mitigating evidence including a history of severe child abuse, mental illness, and severe organic brain damage. In support of this contention, Petitioner submits affidavits from family members, an electroencephalograph report and the report of Dr. William A. O'Connor, a licensed clinical psychologist. (Exh. B)

During the penalty phase of Petitioner's trial, the jury heard testimony from Lloyd Schlup's mother regarding Mr. Schlup's difficult upbringing. *Schlup v. Armontrout*, 941 F.2d 631, 639 (8th Cir. 1991). The jury also heard testimony regarding a prior assault conviction and the fact that the murder of Arthur Dade occurred while Petitioner was incarcerated. The jury determined that these statutory aggravating circumstances rendered Petitioner eligible for the death penalty. Even if the statements of family members, the electroencephalograph report and the report of Dr. O'Connor had been before the jury, it cannot be said that no reasonable juror would have found that the statutory aggravating circumstances nonetheless rendered Petitioner eligible for the death penalty. See *Sawyer*, 112 S.Ct. at 2524.

For all of the foregoing reasons,

IT IS HEREBY ORDERED that Lloyd Schlup's Petition for Writ of Habeas Corpus is DENIED.

IT IS FURTHER ORDERED that Petitioner's Supplemental Motion for Evidentiary Hearing is **DENIED.**

IT IS FURTHER ORDERED that Petitioner's Supplemental Motion to Expand the Record is: **DENIED.**

IT IS FURTHER ORDERED that Respondent's Motion to Vacate the Stay of Execution is **GRANTED**.

IT IS FURTHER ORDERED that the stay of execution entered in this matter on March 12, 1992 is **VACATED** as of ten (10) days from the date of this Order.

Dated this 23rd day of August, 1993.

/s/ Jean C. Hamilton
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LLOYD SCHLUP, Petitioner, v. PAUL DELO, Superintendent Potosi Correctional Center, Respondent.	)	Cause No. 4:92CV00443

JUDGMENT

In accordance with the Memorandum and Order entered in this matter on August 23, 1993 as amended by the Order entered on this date,

IT IS HEREBY ORDERED that Lloyd Schlup's Petition for Writ of Habeas Corpus is **DENIED.**

Dated this 27th day of August, 1993.

/s/ Illegible
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MISSOURI
EASTERN DIVISION

(Caption Omitted in Printing)

Case No. 4:92CV00443 JCH

(Filed September 7, 1993)

MOTION PURSUANT TO RULE 59(E) TO SET ASIDE ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

Comes now Petitioner, by counsel, and moves this Court, pursuant to Rule 59(e), to set aside its order of August 23, 1993, dismissing Mr. Schlup's petition for writ of habeas corpus. Mr. Schlup is demonstrably innocent of the stabbing of Arthur Dade, and has produced substantial evidence credible enough to warrant a hearing. This Court correctly notes that this case is distinguishable from *Herrera v. Collins*, 113 S.Ct. 853, 860 (1993), because the trial evidence of Herrera's guilt was stronger than the evidence against Schlup[1], and Mr. Schlup's evidence of innocence is far stronger than Herrera's.[2] However, the Court is incorrect in its conclusion that Mr. Schlup has "failed to make a persuasive showing of actual innocence." (Memorandum and Order, p. 12). Counsel urges the Court to set aside its order to avoid the execution of an innocent man.

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[1] Herrera confessed to the crime; Mr. Schlup has steadfastly maintained his innocence, and his alibi is captured on video tape.

[2] Mr. Schlup's video-taped alibi is now corroborated by many credible eye witnesses, and the state's identification witnesses are not believable if their testimony is viewed on the record as a whole.

I. THE STATEMENT OF JOHN GREEN AND THE VIDEO-TAPED ALIBI PROVES THAT IT IS IMPOSSIBLE FOR MR. SCHLUP TO BE GUILTY.

This Court does not even mention in its opinion the video tape showing that Mr. Schlup was the first prisoner in line for lunch, or the critical evidence produced by Respondent in Exhibit T, which includes the statement of John Green, the clerk for Housing Unit 5, who told investigators on February 8, 1984, that he was the one who called the control center to alert prison authorities to the assault within seconds of the murder. The theory the state constructed at trial to refute the video-taped proof of Mr. Schlup's innocence depended upon the false assumption that Captain Eberle, who took several minutes to arrive at the scene, was the one who made this call by radio. Mr. Green's statement flatly refutes that theory:

> "I stepped out of the office and I heard Sgt. Flowers calling for officers cause they had a fight. Couldn't get nobody so *he told me to call base to notify them of the fight and that's what I did.*"

Exhibit T, p. 31. Mr. Green's statement is credible because there is no possible motive for Mr. Green to lie; no one knew of the existence of the video tape at the time of the interview, and he had no way of knowing how the information he was giving would affect the investigation. Because Mr. Green called the control center on the telephone as the assault was in progress, and Mr. Schlup was in the prison dining room for over a minute when the guards responded to the call, Mr. Green's testimony, if true, establishes the *impossibility* of Mr. Schlup's guilt.

Neither the significance nor the credibility of his testimony can be dismissed without a hearing.

II. THE STATEMENTS AND AFFIDAVITS OF WITNESSES ARE TOO CREDIBLE TO BE DISMISSED WITHOUT A HEARING.

Counsel has personally talked to every witness whose affidavit has been provided to the Court, and is strongly convinced that they are telling the truth. Although the investigation started with information provided by Mr. Schlup or his mother, counsel discovered the majority of eye witnesses by talking to other witnesses, and by methodically searching for people who were known to be housed in the cell block on the day of the stabbing. The Court has not heard the witnesses, but instead dismisses the testimony for reasons that do not necessarily apply.

A. The delay does not reflect on the credibility of the witnesses where several of them gave consistent statements at the time of the offense, where Mr. Schlup's mother made many fruitless attempts to motivate every attorney who ever represented her son to talk to Van Roberson, LaMont Griffin Bey and others, and where racial tensions in the penitentiary prevented the witnesses from coming forward.

The Court says that the testimony of eyewitnesses to the stabbing is "suspect" because it was produced "after a long delay." (Memorandum and Order, p. 12). Several of these witnesses, including John Green and LaMont

Griffin Bey, made statements consistent with the affidavits they later provided within a day of the stabbing.[3]

There are facts and circumstances which explain the reticence of prisoner witnesses to come forward, including the racial tensions in the cell block before and after the stabbing. Prisoners who saw the crime were aware that had they admitted seeing it, they would have been pressured by prison officials to "snitch" against the people who committed the murder. This particular stabbing heightened racial tensions in the prison because it was rumored to be a "hit" of an African-American inmate (Dade) by members of the Aryan Brotherhood, a white-supremacist prison gang. Many witnesses whose statements are recorded in Respondent's Exhibit T refer to the racial tension in the prison as the reason for not wanting to answer questions.[4] When Maurice Ford was asked whether the possibility of further retaliation made him tense, he replied, "oh, hell yes." (Respondent's Exhibit T,

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[3] This Court noted that Mr. Schlup's mother urged every attorney who ever represented her son to talk to the prisoners who told prison investigators that they saw the murder, and, incredibly, not one single attorney lifted a finger to do this investigation until early 1992. The circumstances of the delay in presenting their affidavits reflect more on the integrity of the bench and bar than it does on the credibility of the witnesses.

[4] "[S]ometimes you see or don't see that's the best way to stay healthy, you see what I'm saying . . . " (interview of inmate Van Roberson, Respondent's Exhibit T, p. 15). Based on Roberson's statement, and the fact that he has been released from prison, Petitioner believed he would be likely to provide reliable testimony establishing Petitioner's innocence. Counsel learned from Roberson's mother that he died about three years ago.

p. 19). Joe Beck heard rumors about African-American prisoners retaliating for Dade's death. (Id., p. 17). The overwhelming majority of inmates took the safest course of action, which is simply not to be a witness.

Although the stabbing occurred in a crowded cell block, only Lamont Griffin-Bey and Ricky McCoy were willing to name the persons involved in the stabbing when they talked to investigators.[5] Counsel's experience has been that prisoners who are unwilling to talk to prison guards will sometimes talk freely with a defense attorney. In this case, it is practically certain that a number of prisoners who said they did not see the murder were not being truthful, either out of fear of reprisal or hostility towards the prison administration, or both. The evidence at trial indicated that the murder happened on a crowded cell block; it is certain that there were other eye-witnesses besides the two guards and the two prisoners.

B. Many inmates who swear to Mr. Schlup's innocence have a strong motive to refrain from perjuring themselves.

Although the Court apparently feels that all prisoner testimony in this case can be dismissed simply because "fellow inmates . . . do not . . . have a strong incentive to refrain from perjuring themselves," (Memorandum and Order, p. 12), this is not an accurate observation in this case. The fact is that many of the prisoners who saw the

[5] Neither of them put the petitioner at the scene of the crime.

murder, including Emmett Nave, Donnell White, Courtney Lovelace and James Pierce, are African-Americans, some of whom belong to Black prison gangs. Because the murder was a "hit" of a Black Muslim prisoner by members of a white supremacist prison gang, these witnesses have an incredibly strong disincentive against perjuring themselves for a white man convicted of stabbing Dade. Donnell White was standing right next to Dade when the stabbing took place. Dade was his friend. There is no conceivable motive for him to perjure himself to clear the assassin of his friend.

C. Rodney Stewart, who was convicted of this crime, has a strong motive not to incriminate himself for Mr. Schlup's benefit.

Rodney Stewart was convicted of this crime, but is still vigorously pursuing his appeals. In fact, he recently appeared (by remote link-up) on the Phil Donahue Show discussing his desire to sell one of his lungs or a kidney to hire legal counsel to pursue his case. Although he has a strong disincentive to incriminate himself, he told an investigator:

> Stewart said since Hurt was a member of the Aryan Brotherhood and he had been threatened, Robert O'Neal told him he wanted to "hit" Stump, or kill him. Stewart said that O'Neal came to him about killing Dade, and Stewart tried to talk him out of it. He said he didn't want anything to do with it, and he claimed that he told O'Neal that he was crazy for doing it.
>
> Stewart said that the day Dade was killed, Stewart knew O'Neal was going to do it because

> O'Neal had been drinking wine, which was some kind of home brew made in the penitentiary, and taking Benadryl and smoking dope. Stewart said O'Neal was really wound up, and he wanted Stewart to hold up a sheet so that the guards could not see him kill Arthur Dade.
>
> Stewart told me that Robert O'Neal got Rocky Jordan, also known as Randy Jordan, to help him kill Arthur Dade. Stewart said that when the doors opened for lunch, Rocky Jordan and Bob O'Neal ran to Dade's cell. He said that O'Neal threw hot water on Dade's face, using an orange cup, and that *Jordan held Dade while O'Neal stabbed him.*

(Affidavit of Larry Bodinson, p. 2). Randy Jordan, a/k/a Rocky Jordan, is the man seen in the video tape sitting at the same table with O'Neal in the prison dining room. Unlike Mr. Schlup, neither O'Neal nor Jordan went through the serving line to get a tray of food.

The Court will note that several prisoners say in their affidavits that they are reluctant to name the third perpetrator for fear of their own safety. Although these men told counsel that Randy Jordan was involved in the stabbing, they were unwilling to put his name in their affidavits, and expressed reluctance at coming to a hearing at which they would have to name Mr. Jordan as the man who assisted O'Neal and Stewart in the stabbing of Arthur Dade. Counsel has no power to offer them protection of any kind for their cooperation. However, counsel was hoping that at an evidentiary hearing, one or more of them would be willing to testify to the identity of the actual perpetrators.

D. The eye-witness testimony of innocence is consistent with the video-tape proof of Mr. Schlup's innocence.

The Court makes absolutely no mention of the video tape which shows that Mr. Schlup is in the prison dining room when Arthur Dade was stabbed. It is impossible to evaluate the strength of the evidence for either side in this case without discussing the video tape. The tape is irrefutable corroboration of the prisoner witnesses, and it shows that the prison guards are mistaken in their identification of Mr. Schlup. It is the key to reconstructing the events on February 3, 1984, because it is the only completely objective evidence available. It establishes the following sequence of events:

> 0:00 Mr. Schlup enters the dining room;
> 1:05 Guards run out of the dining room in response to radio alert;
> 1:31 Robert O'Neal runs into the dining room, and along the back wall toward the rest room as Mr. Schlup carries his tray to a table.

It should also be noted that Mr. Schlup's time before entering the dining room is accounted for by Officer Faherty, who saw him coming down the corridor, and stop to talk to another prisoner through an open window. (trial tr., 315-16). Mr. Schlup in his statement said that the officer (he wasn't sure if it was Officer Faherty or another officer) searched him before he continued on to the dining room.[6] This is a long hallway, and Officer Faherty

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[6] This is consistent with the testimony of Officer Bittle that it was routine to pat down inmates as they entered the lunch room. (Trial tr. 133).

said that besides hollering out the window, there was nothing unusual about his behavior. He did not say that Mr. Schlup was running, or that he was out of breath. This lengthy corridor represents about half of the distance between the housing unit and the dining room. See the Floor Plans of Housing Unit 5A, Trial Exhibit 9, (the 1st floor plan administration level), and Trial Exhibit 10, (level three floor plan). Mr. Schlup had to be in sight or immediate presence of Officer Faherty for around a minute immediately before entering the dining room, and it took him between 30 seconds and a minute to get from the housing unit to that point.[7] Using Mr. Schlup's appearance on the video as "00:00" minutes and seconds, the murder had to have been completed at least one and a half minutes to two minutes earlier to give him time to move from the housing unit to the dining room, stop at the window, and be frisked by the guard. Investigator George Brookes testified for the state that he ran from the scene of the crime to the dining room in 33 seconds, walked it briskly in one minute and three seconds, and walked it at a normal pace in one minute and thirty seven seconds. (Trial tr. 465-66).

Mr. Schlup's participation in the stabbing is completely implausible in light of the fact that Unit Clerk John Green called the assault in to the base within seconds of the stabbing. He saw Dade collapse; he saw

[7] Captain Eberle testified that it took him around a minute to get from the control room, which is right next to the point where Officer Faherty would have first seen Mr. Schlup, up the stairs to the housing unit. (Trial tr. 214). Also see Trial Exhibit 9. Mr. Schlup would have come down from the housing unit by this same route, and travelled approximately the same distance.

Flowers come around the corner with Stewart in custody, and heard Flowers tell him to call base, and Green complied. The call went out no more than a minute after the stabbing; this places Mr. Schlup in the dining room when the murder happened.

The time sequence can also be reconstructed from the moment Mr. O'Neal enters the picture, and counting backward from there. As Officer Brookes proved, the distance from the scene of the crime to the dining room could be covered in less than 35 seconds running, and about a minute walking briskly. Although witnesses establish that Mr. Schlup walked from the housing unit, witnesses establish that Mr. O'Neal hurried to the dining room. Larry Farris, one of the officers seen on the video tape running out of the dining room, saw O'Neal hurrying down the last flight of stairs between T-3 and the dining room. (Trial tr. 322-26).[8] Farris observed blood on O'Neal's trousers, so he turned and followed him back to the dining room. Allowing a full minute for O'Neal to hurry from the scene of the crime to the dining room, Mr. Schlup had already been on camera for thirty seconds when O'Neal fled the scene.

[8] No attempt was made at Mr. Schlup's trial to determine whether Mr. O'Neal was walking or running when Officer Farris encountered him. In O'Neal's trial, Farris testified that O'Neal was "walking down the steps hurriedly." (Trial tr., State v. O'Neal, p. 412).

Immediately after stabbing Arthur Dade, O'Neal fled. (Testimony of Roger Flowers, Trial tr., p. 251).[9] Flowers did not see where he went. Officer Maylee said that he *ran* about 35 feet to a window, broke it, and threw the knife out. (Trial tr. p. 338). He then went to the utility sink, rinsed the blood off, and headed to the dining room.[10] Even generously allowing a full minute for O'Neal to throw the knife out the window and wash in the sink, Mr. Schlup was in the presence of Robert Faherty when O'Neal stabbed Dade.

By suggesting that radio was the only means of communication from the cell block,[11] that the assault call went out when Captain Eberle arrived on the scene with his radio,[12] and that this event took place several minutes after the stabbing, the prosecutor tried to show that the murder happened at least two minutes before Mr. Schlup appeared in the dining room. Mr. Schlup has produced

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[9] Q. You saw O'Neal hit Dade in the chest several times?
A. Yes, sir.
Q. What's the very next thing you saw?
A. That's when the – the very next thing I saw was Bob O'Neal break and run.
(Testimony of John Maylee, Trial tr. p. 354).

[10] The prosecutor on opening statement said, "O'Neal, who had the knife, ran to a window nearby, broke out the window and threw the knife out the window. And then also *ran* to the dining room area. First tried to wash some blood off his hands and then *ran* to the dining room area." (Trial tr. p. 106.) (emphasis added).

[11] It was not; there is a telephone in the office next to the stairway.

[12] This is not so; Joe Green put out the call as the assault was taking place.

proof, which could not have been fabricated, that the call to which the guards responded came seconds after the stabbing. This proof includes not the statement of Joe Green and the testimony of corrections officers who passed Robert O'Neal in the hallway as he was fleeing the scene of the crime.

William Foster's affidavit is important on this point. He signed a sworn affidavit that he did not see the crime, but was on the way to the dining room when he heard the commotion on the cell block. Within seconds of the commotion beginning, he had to step aside for the guards who were running out of the dining room. He turned and followed them, and he ended up being one of the prisoners who carried Dade to the hospital. Again, if this man is telling the truth, Mr. Schlup was already in the dining room when the murder happened. When counsel interviewed Mr. Foster, he could not have understood the significance of this fact. The court has not heard his testimony; counsel is convinced he is telling the truth.

E. The affidavits of members of the Missouri Bar and statements in Respondent's Exhibit T are inherently credible corroboration of Mr. Schlup's substantive and procedural arguments, and warrant an evidentiary hearing.

Petitioner has alleged that the state failed to disclose material evidence, including statements of prisoners who saw the murder, and apparently viewed photographs. The court correctly observes that Lamont Griffin Bey makes no mention of photographs in his affidavit. (Memorandum and Order, p. 14). Although he remembers what

he saw when Dade was stabbed, he does not recall seeing photographs during the interview, even though his statement seems to imply that he was looking at photographs as the investigators were questioning him. This, however, is not dispositive of the issue. The Court overlooks the fact that Respondent's Exhibit T contains explicit reference to Ricky McCoy viewing photographs of suspects.[13] Mr. Bushmann's affidavit also indicates that he did not receive disclosure from the state of any inmate witness who saw the crime, or he would certainly have interviewed them.

III. THE IDENTIFICATION TESTIMONY OF THE ROGER FLOWERS AND JOHN MAYLEE IS UNBELIEVABLE.

The court rests its rejection of the prisoner testimony entirely on the basis of "the positive identifications made by officers Flowers and Maylee . . . " Memorandum and Order, p.12. This conclusion is clearly erroneous in light of the objective evidence of the video tape, which the court never mentions. The court's rejection of Mr. Schlup's direct evidence of innocence, without a hearing, is also clearly erroneous in light of the fact that the testimony of these men is inconsistent and contradictory. There are many problems and inconsistencies in this identification testimony, some or which were known to the jury, but many were not. For purposes of the issue of whether Mr. Schlup has produced sufficient proof to be

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[13] Unfortunately, counsel has learned that Ricky McCoy and Van Roberson are now deceased.

entitled to a hearing on his constitutional claims, the court must look at *all* of the evidence:

> The petitioner must show a fair probability that in light of all the evidence, *including that alleged to have been illegally admitted* (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial, the trier of facts would have entertained a reasonable doubt of his guilt."

Kuhlmann v. Wilson, 477 U.S. 436, 455 n.17 (1986). To hold, as this Court does, that the jury heard many contradictions in the testimony of the officers, and therefore it is of no consequence that the jury failed to hear even more impeachment evidence, (Memorandum and Order, p. 13), entirely misses the point that this testimony is not believable in light of all the evidence.

The Court again declines to account for the significance of the video tape. The Court dismisses in a footnote the prior inconsistent statement of Officer Flowers in which he claims that the suspect he identified as Mr. Schlup ran toward the back end of the hallway, toward the locked end of the walk, *in the opposite direction from the dining room.* If this is true, then the suspect would not have arrived in the dining room several minutes before Robert O'Neal; he would have arrived closer in time to O'Neal, if he got there at all. This is not a trivial inconsistency; under Missouri law in effect at the time of trial, this statement is admissible as substantive evidence that the perpetrator ran in the opposite direction from the dining room. This is not mere impeachment evidence; it greatly enhances the value of the video tape as direct

proof of Mr. Schlup's innocence. It shows that the officers are mistaken in their identification of Mr. Schlup. To say that these *additional* inconsistencies are insufficient to cast doubt upon their testimony because the jury already heard about a lot of *other* inconsistencies is illogical.

IV. LLOYD SCHLUP HAS STEADFASTLY MAINTAINED HIS INNOCENCE.

Mr. Schlup's case is distinguishable from *Herrera* in another important aspect. Herrera confessed; Mr. Schlup has steadfastly maintained his innocence from the very beginning.

On the day Arthur Dade was stabbed, Mr. Schlup was interrogated by Investigator George Brooks and Cole County Deputy, John Hemeyer. Mr. Schlup denied any involvement in the offense and made a statement that proved to be true in every detail.[14] He said that he was the first one down for lunch and was followed by Ricky Easley, Bernard Bailey and Arthur St. Peter. The surveillance camera video tape proved this to be true. He said that before he got to the dining room he was reprimanded by a guard for shouting out of an opened window. Lieutenant Faherty's report indicated that this, too, was the absolute truth. Mr. Schlup adamantly denied that the stains on his shoes were blood; he speculated that it was probably ink. Laboratory tests on his shoes revealed

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[14] He also testified in the penalty phase of his trial consistently with what he told investigators. (Trial tr., 584-85, 604-634).

that he was again telling the truth.[15] Petitioner told investigators that he went directly to the dining room. Mr. Schlup wanted to finish his lunch quickly so that he could go outside and play handball. (Trial tr. 632-33). Hemeyer's inventory of the items taken from Mr. Schlup during the interrogation indicate that he seized a shirt, a pair of pants, shoes and a handball.[16] All of his clothes were taken from him for laboratory testing, and were found to have no traces of blood.

Mr. Schlup's statement, submitted herewith, reveals that he urged police to investigate every aspect of what he was saying. At one point, the interrogators cautioned him about giving specific information that might not check out:

> BASINGER: Well, you'd say it would be pretty positive than if a man identified you as being the one there, it'd almost have to be you, wouldn't it?

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[15] The parties stipulated at Petitioner's trial that the clothes and shoes that were seized from Mr. Schlup contained no evidence of blood whatsoever.

[16] Mr. Schlup testified in the penalty phase of his trial that he was not involved in the stabbing of Arthur Dade. The Prosecutor vigorously cross-examined him, and under Missouri Law, the Defense was then entitled to introduce into evidence the prior consistent statement that Mr. Schlup gave to prison investigators. Trial Counsel attempted to explore the statement in the guilt phase of the trial and was prevented from doing so. (Trial tr. 373-377). However, there was nothing to prevent the proper admission of that statement as rehabilitation of Petitioner during the penalty phase of his trial.

SCHLUP: Nope. Cause he couldn't ain't nobody could identified me over there not nobody identified me. Now I'm sure you could get some officers from the dining room that can identify me as being in the dining room.

BASINGER: I'm sure eventually you got to the dining room, Lloyd, that's not . . .

SCHLUP: Mr. Basinger, I was the first one in the dining room, man.

HEMEYER: Whoa, be careful.

BASINGER: Don't be parachuting on us.

Statement of Mr. Schlup, p. 13. The questioners were obviously skeptical of the possibility that Mr. Schlup could have been involved in the stabbing and make it to the dining room ahead of all the other inmates. At this time, no one knew the dining room surveillance camera had captured the moment on tape.

V. THE STANDARD OF PROOF USED TO DECIDE THE SUFFICIENCY OF MR. SCHLUP'S EVIDENCE OF INNOCENCE, THAT NO REASONABLE JUROR COULD FIND HIM GUILTY OF FIRST DEGREE MURDER, IS A HIGHER STANDARD THAN THAT REQUIRED BY THE U.S. SUPREME COURT.

In reviewing petitioner's constitutional claims, the Court denied relief because it felt that petitioner's claim of innocence could not meet the actual innocence test of *Sawyer v. Whitley*. In a line of recent cases, the Eighth Circuit Court of Appeals has modified and expanded the

scope of the *Sawyer* test and held that it applies to defaulted constitutional claims that are supplemented by petitioners with a colorable claim of innocence of the underlying criminal conviction. *Bolder v. Delo*, 985 F.2d 941, 943 (8th Cir. 1993); *McCoy v. Lockhart*, 969 F.2d 649, 651 (8th Cir. 1992).

Petitioner contends that this extension of the application of the *Sawyer* test to guilt/innocent claims conflicts with the Court's holding in *Sawyer* itself, and opinions of other circuit courts of appeal.

Prior to *Sawyer*, the Court had adopted an actual innocence test to apply to defaulted constitutional claims that were supplemented with a colorable claim of the petitioner's actual innocence of the underlying criminal offense. *Kuhlmann v. Wilson*, 477 U.S. 454 (1986). To overcome a procedural bar under the *Kuhlmann* test, a habeas petitioner must show a fair probability in light of all the evidence, including evidence that is newly discovered, that the trier of fact would have entertained a reasonable doubt of petitioner's guilt. *Id.* at 545, n.17. The *Kuhlmann* test was later adopted and cited with approval in the abuse of the writ and procedural bar context in *McCleskey*, 111 S. Ct. at 1471 and *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1721 (1992). Petitioner's constitutional claim would clearly be reviewable under the *Kuhlmann* test because, if a second jury heard the new evidence, there is a reasonable likelihood petitioner would have been acquitted of the offense of capital murder. One could not conclude otherwise when the evidence consists of the testimony of eye-witnesses to the crime, corroborated by a video-taped alibi.

However, under the eighth circuit's modified reading of the *Sawyer* test, the court found that petitioner could not meet the burden of establishing that no reasonable juror would have found him guilty of capital murder in light of his newly discovered evidence of actual innocence, simply because the evidence at trial consisted of the testimony of two prison guards' "positive identification" of Mr. Schlup, even though this evidence is contradictory and inconsistent on material points. The eighth circuit's expansive and modified application of the *Sawyer* test to claims of innocence going to the underlying criminal conviction is clearly contrary to the Court's opinion in *Sawyer.*

In the majority opinion, Chief Justice Rehnquist cited with approval the *Kuhlmann* actual innocence test regarding the appropriate standard for federal courts to apply to claims affecting guilt or innocence of the underlying crime. *Sawyer,* 112 S. Ct. at 2519, n.5. Shortly thereafter, Chief Justice Rehnquist noted that:

> The present case requires us to further amplify the meaning of 'actual innocence' in the setting of capital punishment. A prototypical example of 'actual innocence' in a colloquial sense is a case where the state has convicted the wrong person of the crime. . . . In the context of a noncapital case, the concept of 'actual innocence' is easy to grasp.

Id. at 2519-2520. Clearly as the foregoing language in the *Sawyer* majority opinion indicates, the *Kuhlmann* standard remains the proper test for federal courts to apply when analyzing defaulted constitutional claims supplemented

with a claim of innocence going to the underlying criminal conviction. The Court did not overrule *Kuhlmann;* to the contrary, it re-affirmed that test. Petitioner suggests that a close reading of *Sawyer* indicates that the Court adopted a standard for abusive or defaulted *sentencing* claims that is deliberately higher than that applied to defaulted guilt/innocence claims.

This view is supported by the fact that the other circuit courts of appeals who have decided the scope of the *Sawyer* test have concluded that *Sawyer* should be strictly limited to claims affecting the propriety of death sentences in capital cases and that the *Kuhlmann* and *McCleskey* standards still are applicable to constitutional claims raising issues of a petitioner's innocence of the underlying crime. *Montoya v. Collins,* 988 F.2d 11, 13 (5th Cir. 1993); *Campbell v. Blodgett,* 982 F.2d 1321, 1331 (9th Cir. 1992). The eighth circuit's broad reading and application of the test formulated in *Sawyer* exceeds the scope for which that test was intended by the Court, and is in clear conflict with opinions from other circuits.

VI. IT VIOLATES MR. SCHLUP'S DUE PROCESS AND EIGHTH AMENDMENT RIGHTS TO EXECUTE HIM WHEN HE PRESENTS A TRULY PERSUASIVE CASE OF INNOCENCE OF THE UNDERLYING CRIME BASED UPON POST-TRIAL NEWLY DISCOVERED EVIDENCE THAT, IF PRESENTED TO A SECOND JURY, WOULD PROBABLY RESULT IN PETITIONER'S ACQUITTAL OF CAPITAL MURDER.

Petitioner's case presents the questions left unanswered by this Court's fragmented opinions in the

recent decision of *Herrera v. Collins*, 506 U.S. ___, 122 L. Ed. 2d 203, 113 S. Ct. 853 (1993). In *Herrera*, the sharply divided Court did not decide the question of what standard of review to apply when considering a state death row inmate's claim of innocence based upon post-trial newly discovered evidence. At least six members of this Court explicitly recognized in *Herrera* that it would offend the federal Constitution to permit the execution of a state death row inmate who could present a convincing case of actual innocence based upon newly discovered evidence. However, this Court did not ultimately decide what quantum of proof is necessary for a petitioner to be entitled to relief from his conviction and death sentence.

Petitioner contends this Court should apply the standard of review announced by this Court in *Kuhlmann v. Wilson*, 477 U.S. 436, 455, n.17 (1986). Under the *Kuhlmann* test, a habeas petitioner will be entitled to relief if there is a fair probability in light of all the evidence, including the newly discovered evidence, that the "trier of facts would have entertained a reasonable doubt of [petitioner's] guilt." *Id.* In other words, a habeas petitioner basing a claim on newly discovered evidence, must show that the jury would probably have had a reasonable doubt as to his guilt.

A test similar to that in *Kuhlmann* has been adopted by several courts of appeals in analyzing federal habeas petitioner's claims of actual innocence based upon newly discovered evidence. *Jeffries v. Blodgett*, 988 F.2d 923 (9th Cir. 1993); *Lewis v. Erickson*, 946 F.2d 1361 (8th Cir. 1991); *Sanders v. Sullivan*, 863 F.2d 218 (2d Cir. 1988); and *Williams v. Griswold*, 743 F.2d 1533 (11th Cir. 1984). This line of court of appeals cases has recognized that a prisoner's

due process rights are violated where a state fails to grant a prisoner relief where credible newly discovered evidence "would most likely affect the verdict." *Sanders v. Sullivan*, 863 F.2d at 224-225.

Justice O'Connor recognized that it would violate the federal constitution to execute an individual who could present a convincing case of innocence based upon post-trial newly discovered evidence. *Id.* at 228. However, in Justice O'Connor's view, it was unnecessary to decide that question in *Herrera* because Herrera's newly discovered evidence did not even come close to presenting a convincing case of innocence. *Id.* As Justice O'Connor pointed out:

> Ultimately, two things about this case are clear. First is what the Court does not hold. Nowhere does the Court state that the Constitution permits the execution of an actually innocent person. Instead, the Court assumes for the sake of argument that a truly persuasive demonstration of actual innocence would render any such execution unconstitutional and that federal habeas relief would be warranted if no state avenue were open to process the claim. . . . Accordingly, the Court has no reason to pass, and appropriately reserves, the question of whether federal courts may entertain convincing claims of actual innocence. That difficult question remains open.

Id. at 233-234.

VII. THE CONDUCT OF THE STATE COURT DESTROYED THE INTEGRITY OF THE STATE POSTCONVICTION PROCESS. THIS COURT'S CONCLUSION THAT THIS CONDUCT, WHICH PRECLUDED HIS STATE COUNSEL FROM INVESTIGATING THE CASE, AND WHICH FEDERAL HABEAS COUNSEL WAS AFRAID TO ADDRESS, DOES NOT SATISFY THE CAUSE AND PREJUDICE TEST IS INCONSISTENT WITH THE EQUITABLE NATURE OF HABEAS CORPUS REVIEW.

The federal courts agree on a handful of factors that are relevant in evaluating the equities of disturbing a final judgment, including whether petitioner demonstrates difficult circumstances, whether the parties have relied on the finality of the judgment, whether the petitioner was never heard, but advances meritorious claims in the underlying litigation, or whether *finality would undermine public confidence in the judicial system. See Klapprott v. United States*, 335 U.S. 601, 614-15 (1949); *Liljeberg*, 56 U.S.L.W. at 4642-43; *Jackson v. People's Republic of China*, 794 F.2d 1490, 1496-97 (11th Cir. 1986); *Ritter v. Smith*, 811 F.2d 1398, 1401-02 (11th Cir. 1987). In *Liljeberg v. Health Services Acquisition Corp.*, 56 U.S.L.W. 4637 (1988), the court relieved a party from an unfair and improper judgment, vacating the judgment months later merely to redress the appearance of impropriety. *Id.* at 4643. The opposing party had not demonstrated "special hardship" by reason of reliance on the order and thus the court found "a greater risk of unfairness in upholding the judgment . . . than there is in allowing . . . a fresh look at the issues." *Id.*

Both petitioner and his mother have persistently attempted to motivate members of the Missouri Bar to investigate his case. Mr. Schlup named several witnesses in his pro se motions. Each time a new attorney was appointed for Mr. Schlup, his mother personally visited that attorney, and explained that there were witnesses to the crime who needed to be interviewed. Each time, she left counsel's office with assurances that the investigation would be done. She met with Mr. Kempton and Mr. Howard, but neither of them talked to a single witness. Each of them have provided affidavits explaining the circumstances. Submitted herewith are the motions for continuance that Mr. Kempton filed in the Missouri circuit court. Mr. Kempton told the Rule 27.26 hearing court:

> . . . [Mr. Schlup] has specifically requested and directed counsel to locate, interview and depose certain witnesses who Petitioner believes to have relevant and material information and evidence concerning Petitioner's claims herein.
>
> * * *
>
> That counsel for petitioner has not had sufficient and adequate time to conduct investigation and discovery which Petitioner has requested and which counsel believes is necessary to the proper presentation of the issues herein.
>
> * * *
>
> That Petitioner does not intend to waive any claim or right herein. In fact, Petitioner has expressly advised counsel that he declines to waive any claim raised in his 27.26 motion filed herein or any claim which could be discovered and raised herein if counsel were allowed to

> conduct full and adequate discovery and investigation and adequately prepare for a hearing herein.

Motion for Continuance, *Schlup v. State*, St. Charles County case no. CV187-3457CC, filed October 29, 1987.[17]

Although the U.S. Supreme Court indulges in the fiction that an attorney acts as an agent of the client, thereby justifying its decision in *McClesky v. Zant*, 111 S.Ct. 1454 (1991), which irrevocably binds the client to the oversight of the lawyer, in this case that fiction is demonstrably untrue. Mr. Schlup and his mother did everything they could to spur counsel into action. It is outrageously unfair that Mr. Schlup will be killed because one attorney was impeded and another intimidated by the improper conduct of a member of the judiciary. This Court's ruling that this conduct, as a matter of law, does not provide adequate cause to allow an innocent man to have his eyewitnesses heard in a court of law perpetuates the blemish that this puts on the integrity of American justice. Mr. Schlup's execution, if allowed to go forward, will be a shameful event for the bench and the bar of this state.

Although the U.S. Supreme Court has recently restricted the circumstances under which a habeas petitioner can upset the finality of a state judgement, it has preserved the cause and prejudice exception and the miscarriage of justice exception to the doctrines of abuse of the writ and procedural default. Justice O'Connor stated in *Smith v. Murray*, 477 U.S. 478, 495 (1986), "That in

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[17] The motion names Lamont Griffin and Jack Babcock among the witnesses to be interviewed.

appropriate cases, the principles of comity and finality that form the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration." Furthermore, the conduct of a state court may satisfy the "cause" element of the cause and prejudice test. See. e.g., *Godfrey v. Kemp*, 836 F.2d 1557, 1569 (11th Cir. 1988), *cert. dismissed*, 487 U.S. 1264 (1988), finding "cause" where a state court denied the petitioner an "opportunity to file a timely objection." Mr. Kempton in his affidavit and in his motion for continuance has explained in detail his inability to investigate and present the very evidence that Petitioner now seeks to have heard.[18]

It is also clear from the facts that when the 8th Circuit Court of Appeals denied Mr. Schlup's first habeas petition, it had no idea what the witnesses in question would actually have said. Furthermore, it had no opportunity to address the existence of the many subsequently discovered witnesses who saw the stabbing of Arthur Dade. None of the testimony relied upon in that opinion was from anyone who had actually spoken with the witnesses. This court had sufficient evidence before it to determine that it would be necessary to hear additional evidence. Trial counsel in his affidavit does not assert a strategy reason for not interviewing these potential eyewitnesses, and now acknowledges that he would in fact have called these witnesses at trial had he known that they saw the

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[18] He also sets out in his motion for continuance the fact that at the time of the Rule 27.26 hearing, the transcript of the Wickizer trial had not yet been prepared. He presented this as further reason for continuing the hearing.

stabbing. It is unreasonable to rely on the previous denial of a similar claim based on inaccurate facts. (See Memorandum and Order, p. 18). Petitioner has amply demonstrated that the ends of justice require the court to address this claim. *Kuhlmann v. Wilson*, 477 U.S. 436 (1986).

CONCLUSION

On appeal from the denial of Mr. Schlup's previous petition Senior Judge Heaney noted:

> This was a close case. There was conflicting evidence as to Schlup's guilt, and Schlup was able to present a plausible alibi defense. While I believe the evidence was sufficient to support Schlup's conviction, the evidence was not overwhelming, and the jury deliberated several hours before it reached a verdict. Under such circumstances, it is particularly important that the penalty phase of a trial be free from prejudicial error.

Schlup v. Armontrout, Slip opinion no. 90-1164, p. 27-28 (8th Cir., filed July 22, 1991). (Heaney, Sr. J., dissenting). Judge Heaney, when he made that statement, was not aware of the evidence that Petitioner tendered to the District Court in conjunction with this petition for writ of habeas corpus. The evidence in support of Petitioner's claims reveal that the state's case is far weaker, and Petitioner's defense is far stronger than he originally thought.

Since, as this Court has noted, petitioner's claim of innocence is factually much stronger than Herrera's, this Court should set aside its order denying Mr. Schlup's

petition and hear the evidence of his innocence. In the alternative, this Court should extend its stay of execution in order to facilitate orderly resolution of the vitally important question of the appropriate procedures and standard of review to apply to innocence claims. WHEREFORE, Petitioner moves this court to:

1. Set aside its order of August 23, 1993;

2. Reinstate the stay of execution presently in effect pending the disposition of this motion;

3. Hold an evidentiary hearing; and

4. Enter an order issuing the writ of Habeas Corpus.

Respectfully submitted,

MISSOURI CAPITAL
PUNISHMENT
RESOURCE CENTER

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MISSOURI
EASTERN DIVISION

(Caption Omitted In Printing)

Case No. 4:92CV00443 JCH

(Filed Sept. 9, 1993)

SUPPLEMENTAL MOTION PURSUANT TO RULE 59(E) TO SET ASIDE ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

Comes now Petitioner, by counsel, and for his supplemental motion pursuant to Rule 59(e) to set aside this Court's order of August 23, 1993, states as follows:

1. In his Traverse and in his original motion under Rule 59(e), Petitioner explained to the Court that the statement of John Green, the clerk for Housing Unit 5 in February, 1984, was powerful evidence of Mr. Schlup's innocence, and the Court should hear his testimony before deciding Mr. Schlup's fate. The Court makes no mention of Mr. Green's statement in its Memorandum and Order dismissing Mr. Schlup's petition.

2. Mr. Green on February 8, 1984, told prison investigators that Sergeant Flowers, the first Corrections Officer at the scene of the stabbing, told him to call base for help. Green said that he complied with that order. At trial, no one knew who put out the assault call to which the dining room guards responded. It was assumed, incorrectly, that Captain Eberle was the officer who did so because he was the first to arrive at the scene with a radio. Mr. Schlup's video-taped alibi was rejected by the jury because Eberle's call was several minutes after the incident, allowing Mr. Schlup time to run to the dining room to be first in line for lunch. Mr. Green's statement

that he called base within seconds of the stabbing is persuasive, if not conclusive, rebuttal of this theory. Green could not have known when he made this statement that Mr. Schlup was in the dining room for a full minute when the call went out. There is no conceivable motive for him to have fabricated this information.

3. Counsel for Mr. Schlup has located Mr. Green and on September 7, 1993, traveled to Mr. Green's home in Washington County, Kansas, to interview him.

4. Mr. Green provided a sworn affidavit stating that he saw the murder of Arthur Dade. Although prisoners who saw the murder are reluctant to name the actual perpetrators, Mr. Green has not returned to prison since his release in January of 1986. He does not have the same fear of retribution that other witnesses have expressed.

5. Mr. Green not only verifies under oath his earlier statement that he called base within seconds of Dade's hitting the ground, he also states that he saw the stabbing of Arthur Dade. He saw Randy (a/k/a/ Rocky) Jordan hold Arthur Dade while Robert O'Neal stabbed him. This is consistent with what other witnesses have told counsel. However, since these witnesses are still in prison, they are reluctant to sign any document naming the actual perpetrator. Mr. Green provides a persuasive eye-witness account that Mr. Schlup is not guilty of the crime.

6. Submitted herewith is the affidavit of Mr. Green and the following exhibits to his affidavit:

A. Affidavit Exhibit 1: (Filed under seal, pursuant to agreement) The floor plan of Housing Unit 5A, with Mr. Green's notes regarding the location of certain people and events;

B. Affidavit Exhibit 2: A photograph of Randy Jordan, on the back of which Mr. Green noted, "This is Randy (Rocky) Jordan, the man who held Dade while O'Neal stabbed him."

C. Affidavit Exhibit 3: A photograph of Robert O'Neal, on the back of which Mr. Green noted, "This is Robert O'Neal, the man who stabbed Arthur Dade while Jordan held him."

D. Affidavit Exhibit 4: A photograph of Rodnie Stewart, on the back of which Mr. Green noted, "I recognize this man as Rodney Stewart, the man Sgt. Flowers took down stairs after Dade was stabbed."

E. Affidavit Exhibit 5: A photograph of petitioner, on the back of which Mr. Green noted, "I recognize this man as Lloyd Schlup. I did not see him anywhere around when Dade was stabbed."

7. Petitioner has presented a truly persuasive case of innocence. Mr. Schlup has now produced affidavits and statements of fifteen eyewitnesses to the stabbing of Arthur Dade; a video tape showing that he was in the prison dining room when Arthur Dade was stabbed; statements of witnesses who corroborate the fact that the corrections ran out of the dining room more than a minute after petitioner entered the room, but within seconds of Dade's stabbing; and numerous contradictions and inconsistencies in the testimony of the state's identification witnesses. Furthermore, petitioner has produced sufficient evidence to obtain an indictment and support a conviction against the real culprit, Rocky Jordan. What more would a petitioner have to show this Court to prevent his execution without a hearing?

WHEREFORE, the Petitioner moves this Court to set aside its order of August 23rd, 1993, dismissing his petition for writ of habeas corpus without a hearing and dissolving his stay of execution.

Respectfully submitted,

MISSOURI CAPITAL
PUNISHMENT RESOURCE
CENTER

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Attorney for Petitioner

Affidavit

Comes now affiant, John Green, born November 22, 1961, and first being duly sworn, states as follows:

On February 3rd, 1984, I was the Unit Clerk in Housing Unit 5 of the Missouri State Penitentiary in Jefferson City, MO. A unit clerk processes paperwork, sorts mail, types, and follows orders given by corrections officers. I worked in the office of the Housing Unit.

On that day, I was standing near Sergeant Flowers by the lever box for one walk as he was "racking the walk," which means he was pulling the master lever that opened all the cells. I was talking to him at the time drinking a

cup of coffee. I don't remember what we were talking about. Flowers stepped away from the lever box, and I was left standing by myself. I didn't see where he went, but under normal circumstances, he would have headed straight over to the "B" side of the housing unit to rack those walks.

I looked down one walk, and I saw Randy Jordan holding Arthur Dade. Jordan was standing behind Dade, and had Dade's arms pinned to his sides from behind. I saw Robert O'Neal stab Dade several times in the chest while Jordan was holding him.

Dade broke loose and ran straight toward me. I saw him collide with Rodnie Stewart and fall to the ground near the paint storage area. Sergeant Flowers hollered for help. I think there was so much noise that he didn't think the other guards in the Housing Unit heard him, so he told me to call base. He was on his way to break up the fight when he told me to call base. I immediately went into the office, picked up the phone, and called base.

A sergeant at the base picked up the phone. I told him there was a fight in Housing Unit 5A. He said something like, "OK," and I hung up the phone.

While I was at MSP, I was a clerk in the captain's office right next to the base. They have a radio base unit with a table-top microphone.

I don't think I said anything about a man being down. I just said there was a fight in Housing Unit 5-A and the guards need help.

I stepped out of the office and watched as Sergeant Flowers was taking Stewart down the steps. Dade was

lying right where he had fallen, and was bleeding from his mouth and through his shirt. When Captain Eberle arrived, I went back to the office.

A few days later I was questioned in the Captain's office by investigators Brooks and Dearixon. They asked me if I saw the murder, and I told them I didn't because I was concerned about my safety. I knew that Jordan and O'Neal were in the Aryan Brotherhood, and if I said I saw them do it, they could easily have me killed.

When I talked to Brooks and Dearixon, I did not know that Lloyd Schlup had been accused of being the guy who held Dade while O'Neal stabbed him. I told them that Sergeant Flowers told me to call base, and that I followed his order.

I never saw Lloyd Schlup at the scene of the crime. When I called base, it was within seconds of Dade hitting the ground. It could not have been more than a half minute or a minute after he was stabbed by Jordan and O'Neal. It happened very fast.

I have been out of prison since January 29, 1986. I have never been contacted by Lloyd Schlup or anyone acting on his behalf since the day Arthur Dade was stabbed. I remember Lloyd, but we were not friends at MSP. The first person to contact me about this was an investigator who said she was working for Sean O'Brien. She called me about three days ago, and I agreed that I would see Mr. O'Brien and talk to him about what I saw. Mr. O'Brien called me later that night and I gave him directions to my house.

On exhibit one, which is the floor plan of Housing Unit 5A, I drew an "X" showing about where I stood when I saw the stabbing, and I indicated the general area where I saw the attack take place. It could have happened a few feet in either direction, from where I drew the circle. I also drew an X where I saw Dade fall, and where the telephone is that I used to call the base.

Affidavit Exhibit 2 is a picture of Randy "Rocky" Jordan, the man I saw hold Dade while Robert O'Neal stabbed him. Affidavit Exhibit 3 is a picture of Robert O'Neal, the man I saw stabbing Dade while Jordan held him. Affidavit Exhibit 4 is a picture of Rodnie Stewart, the man who Flowers took downstairs. Affidavit Exhibit 5 is a picture of Lloyd Schlup. I did not see him on the walk at all when Dade was stabbed.

If I had been contacted before Schlup's trial, I would have told his attorney that he was not there when Dade was stabbed, and I would have testified that I called base within seconds after Dade hit the ground. I might have been reluctant to snitch on Jordan and O'Neal. I'm not afraid now because I haven't been in prison for more than 7 1/2 years, and I have been working steadily ever since. I have no intention of going back to prison.

I have read this affidavit, and it is the truth.

/s/ John L. Green
John L. Green

County of Washington
State of Kansas

Subscribed and sworn before me this 7th day of September, 1993.

/s/ Marilyn A. Morgan
My appt. expires 9-13-93.

Affidavit Exhibit 2

This is Randy (Rocky) Jordan, the man who held Dade while O'Neal stabbed him.

/s/ John L. Green
9-7-93

Affidavit Exhibit 3

This Robert O'Neal, the man who stabbed Dade while Jordan held him.

/s/ John L. Green
9-7-93

Affidavit Exhibit 5

I recognize this man as Lloyd Schlup, I did not see him anywhere around when Dade was stabbed.

/s/ John L. Green
9-7-93

Affidavit Exhibit 4

I recognize this man as Rodney Stewart, the man Sgt. Flowers took down stairs after Dade was stabbed.

/s/ John L. Green
9-7-93

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LLOYD SCHLUP, Petitioner, v. PAUL DELO, Superintendent Potosi Correction Center, Respondent.	)	Cause No. 4:92CV00443

ORDER

Upon careful consideration of Petitioner's Motions, the materials filed in support thereof and Respondent's Suggestions in Opposition,

IT IS HEREBY ORDERED that petitioner's Motion Pursuant to Rule 59(E) to Set Aside Order Dismissing Petition for Writ of Habeas Corpus is **DENIED.**

IT IS FURTHER ORDERED that Petitioner's Supplemental Motion Pursuant to Rule 59(E) to Set Aside Order Dismissing Petition for Writ of Habeas Corpus is **DENIED.**

Dated this 13th day of September, 1993.

/s/ Illegible
UNITED STATES
DISTRICT JUDGE

United States Court of Appeals,
Eighth Circuit.

Lloyd E. SCHLUP, Appellant,

v.

Paul K. DELO, Appellee.

No. 93-3272.

Submitted Nov. 3, 1993.

Decided Nov. 15, 1993.
Order Denying Suggestion for
Rehearing En Banc and Motion
for Stay Nov. 17, 1993

Before JOHN R. GIBSON, Circuit Judge, HEANEY, Senior Circuit Judge, and BEAM, Circuit Judge.

BEAM, Circuit Judge.

Lloyd Eugene Schlup, a Missouri death-row inmate, requests a stay of execution and reversal of the district court's judgment denying his second petition for a writ of habeas corpus under 28 U.S.C. § 2254. The district court[1] dismissed Mr. Schlup's second petition on August 23, 1993, and denied his subsequent Fed.R.Civ.P. 59(e) motion to set aside the dismissal order. The district court's final ruling came on September 13, 1993, and Mr. Schlup's appeal and motion for a stay of execution pending the resolution of his appeal followed.

The district court dissolved its stay of execution on September 15, 1993, in conjunction with its final rulings on the second petition. After a hearing, we denied the

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[1] The Honorable Jean C. Hamilton, United States District Judge for the Eastern District of Missouri.

motion for stay pending appeal. Schlup v. Delo, No. 93-3272, 1993 WL 409815, 1993 U.S. App. LEXIS 26748 (8th Cir. Oct. 15, 1993). We now vacate that opinion and consider a renewed request for stay and the merits of Mr. Schlup's appeal.

In support of his second petition for habeas relief, this appeal, and the renewed request for stay of execution, Mr. Schlup tendered to the district court and now tenders to this court several affidavits and statements, mostly from present or former prisoners, purporting to be newly discovered evidence tending to establish that he was not present at the scene of the murder for which he was sentenced to death. He also renews his reliance on a videotape, offered at trial as part of an alibi defense, showing his presence in the dining room near the time of the murder. In other words, appellant says he could not have been present at the assault and is actually innocent of the crime.

I.

In his second petition, Mr. Schlup asserts a number of constitutional claims not raised, or raised and denied in his first petition. Thus, these allegations constitute either successive or abusive uses of the writ, 28 U.S.C. § 2244(b), and may be considered by this court only under limited circumstances. Sawyer v. Whitley, ___ U.S. ___, ___, 112 S.Ct. 2514, 2518, 120 L.Ed.2d 269 (1992).

> Unless a habeas petitioner shows cause and prejudice, see Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), a court may not reach the merits of: (a) successive claims

> which raise grounds identical to grounds heard and decided on the merits in a previous petition, Kuhlmann v. Wilson, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986); (b) new claims, not previously raised which constitute an abuse of the writ, McCleskey v. Zant, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); or (c) procedurally defaulted claims in which the petitioner failed to follow applicable state procedural rules in raising the claims. Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). These cases are premised on our concerns for the finality of state judgments of conviction, and the "siginficant costs of federal habeas review." McCleskey, supra, at 490-91, 111 S.Ct. at 1468; see, e.g., Engle v. Isaac, 456 U.S. 107, 126-128, 102 S.Ct. 1558, 1571-1572, 71 L.Ed.2d 783 (1982).

Id. (parallel citations omitted).

Mr. Schlup seeks to establish "cause and prejudice" or, in the alternative, seeks to establish his "actual innocence" of the crime as a means of obtaining federal court review of his constitutional claims. The district court reviewed and denied his cause and prejudice allegations. We agree with this result and adopt the well-reasoned opinion of the district court in this regard.

II.

A. Procedural Bar

Under a second federal habeas review of a petitioner's state court conviction, a claim of actual innocence requires a dual analysis. First, we must consider Mr. Schlup's attempt to invoke the rule announced in

Kuhlmann v. Wilson, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986) that even if a petitioner cannot meet the cause and prejudice standard, a federal court may examine the merits of a constitutional claim if failure to do so would result in a miscarriage of justice. Id., at 454, 106 S.Ct. at 2627. A petitioner "may make the requisite showing by establishing that . . . he has a colorable claim of factual innocence." Id. The contours of this qualification were more clearly delineated by the Supreme Court in Sawyer v. Whitely, which referred to the test as the miscarriage of justice or "actual innocence" exception. Sawyer, ___ U.S. at ___, 112 S.Ct. at 2519.

In this context, actual innocence is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Herrara v. Collins, ___ U.S. ___, ___, 113 S.Ct. 853, 862, 122 L.Ed.2d 203 (1993). Thus, the question is: Has this appellant established "actual innocence" as defined by the Supreme Court? We think not, at least under the test this panel must apply.

Sawyer dealt with the punishment phase of the criminal proceeding as opposed to the guilt or innocence phase of the trial. Therefore, appellant argues, with some justification, that Sawyer announced only a test for analyzing the fairness of the death penalty portion of a trial. And, the Supreme Court did say, in Sawyer, with regard to guilt or innocence:

> Our standard for determining actual innocence was articulated in Kuhlmann as: "[T]he prisoner must 'show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.' "

Sawyer, ___ U.S. at ___, 112 S.Ct. at 2519, n. 5 (citations omitted).

On the other hand, Sawyer says that "actual innocence" under the death penalty phase of a case must be determined by considering whether a "petitioner has shown by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty." Id., at ___, 112 S.Ct. at 2523. Says appellant, this seemingly higher (penalty) test is necessary because the amorphous concept of being actually "innocent of death" requires a more objective standard. Id., at ___, 112 S. Ct. at 2519-20. In other words, in the context of guilt or innocence of the crime itself, the concept of "actual innocence" is easier to grasp. Id., at ___, 112 S.Ct. at 2520. Thus, the more subjective Kuhlmann test is sufficient.

Whatever the merits of appellant's contentions, we do not write on a clean slate. We must reject appellant's argument because in this circuit "the new standard [required by Sawyer] applies equally to challenges to a conviction, not just challenges to a death sentence." McCoy v. Lockhart, 969 F.2d 649, 651 (8th Cir.1992). And, the imprimatur of this court en banc was stamped on the McCoy holding in Cornell v. Nix, 976 F.2d 376 (8th Cir.1992) (en banc), cert. denied, ___ U.S. ___, 113 S.Ct. 1820, 123 L.Ed.2d 450 (1993). Accordingly, we make our

determination of whether Mr. Schlup's claim of actual innocence opens the gateway to our consideration of his constitutional claims on that basis.

Before reviewing the gateway evidence now advanced by Mr. Schlup, we consider the presence or absence of any constitutional error at the trial for which relief could be granted. The dissent contends that there was constitutional error in the form of "utter ineffectiveness of Schlup's trial counsel" and that but for this error "the jury would have received the full picture of Dade's murder, and if it were to credit the evidence it would have no choice but to acquit." The dissent barely mentions that, although the district court found the claim of ineffective assistance to be procedurally barred, we disregarded this holding and considered the merits of this ineffective assistance claim in the appeal of Mr. Schlup's first petition for habeas relief. Schlup v. Armontrout, 941 F.2d 631, 638-42 (8th Cir.1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1273, 117 L.Ed.2d 499 (1992). We found that under the test announced in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), Mr. Schlup's counsel was not ineffective at either the guilt or penalty stages of the state trial proceeding. Schlup, 941 F.2d at 639. We see no reason to change this result even if we consider the evidence Schlup now presents.

As at the first habeas, Mr. Schlup faults his counsel, Mr. Bushmann, for failing to sufficiently investigate the facts surrounding the murder of Arthur Dade. The dissent agrees. This allegation is erroneous and unfair.

There were three inmates involved in the murder. The three lawyers representing the accused worked together on parts of their investigations. Mr. Bushmann spearheaded the discovery and defense preparation. He arranged and participated in the taking of thirty-eight depositions including those of every guilt witness who testified at trial and who was directly related to the prison. It was Mr. Bushmann's persistence that confirmed the existence of the dining room videotape now used by Mr. Schlup in his effort to show actual innocence. Mr. Bushmann also determined through discovery that one hundred persons were interviewed by prison investigators and appears to have obtained, for review, the tapes or transcripts of all the statements resulting from these inquiries. The trials of the other inmates occurred prior to Mr. Schlup's trial and Mr. Bushmann claims to have reviewed the crucial portions of this trial testimony in preparation for Mr. Schlup's defense. The problem does not seem to be deficiencies in trial preparation by Mr. Bushmann but, rather, the changing nature of the information presented by some of the individuals present at or near the deadly assault.

At trial, as noted by the district court, two prison officials, who were eyewitnesses to the crime, positively identified Mr. Schlup as one of the three perpetrators of the murder. This evidence was clearly admissible and stands unrefuted except to the extent that Mr. Schlup now questions its credibility. Witnesses' credibility, however, is an issue reserved for the trial jury. It is not a matter within the province of the district court or of this court in a habeas proceeding. Federal habeas, as explained in Herrera, does not provide a forum for the retrial of a

convicted felon. Herrera v. Collins, ___ U.S. ___, 113 S.Ct. 853, 860-61, 122 L.Ed.2d 203 (1993). So, even if we disregard the source of the new evidence, the eleventh-hour nature of the information, and a presentation coming almost six years after the trial; it is simply not possible to say that the appellant has shown by clear and convincing evidence that but for a constitutional error no reasonable jury would have found him guilty. Therefore, there is no basis for sustaining the motion for stay, Delo v. Blair, ___ U.S. ___, 113 S.Ct. 2922, 125 L.Ed.2d 751 (1993), or for reversing the district court.

Even so, we will discuss the "newly discovered" evidence presented by Mr. Schlup. This information comes in the form of written statements, affidavits, and a timed analysis of the videotape taken in the dining room. We have now heard oral argument on these matters twice.

The major thrust of Mr. Schlup's purported showing of actual innocence involves his alibi defense. Through use of the videotape, timed on a second-by-second basis, Mr. Schlup claims that he could not have been at the murder scene. He was, he claims, in the dining room at the time.

Mr. Schlup primarily relies upon two affidavits, one from a former prisoner and one from a former employee at the institution.[2] The latter document is dated October

[2] At oral argument, the state contended that the employee was discharged. The petitioner claims he retired. We find nothing in the record either way.

26, 1993, eight days before we heard oral argument on the merits of this appeal.

John L. Green, an inmate at the Missouri Prison in Jefferson City at the time of the murder, in an affidavit dated September 7, 1993, states that he was "standing near Sergeant Flowers" at the lever box that opens the cells to unit 5A and from such position saw the murder. He further says that Sergeant Flowers directed him to call "base" to report the fight and that he immediately went into the office and made the call.

In conjunction with this new information, the affidavit of Robert Faherty, a former lieutenant at the prison, is presented. He places Mr. Schlup in his presence in a corridor to the dining hall for a two and a half to three-minute period as Mr. Schlup proceeded from housing unit 5A, the location of the murder, to the dining hall.

The videotape is then presented to show Mr. Schlup arriving at the dining hall first in line. According to the videotape, the corrections officers depart form the hall one minute and five seconds later, purportedly as a result of a call from "base" reporting the assault. This, Mr. Schlup contends, shows that he had left the housing unit before the assault occurred. Since Mr. Schlup arrived, according to Mr. Faherty's calculation, at least three and a half to four minutes after leaving the housing unit, and, the assault occurred, according to Mr. Green's statement and the videotape, one and a half to two minutes prior to his arrival at the dining room, Mr. Schlup has an alibi. This was the same defense Mr. Bushmann attempted to establish at trial.

However, Mr. Green has made two prior statements. He told prison investigators that on February 3, 1984, the day of the murder, he was in the office at the housing unit, not next to Sergeant Flowers at the lever box some distance away, and that he did not observe the murder at all. he did state that he called "base" for help but on a different timing sequence. Of more importance is Mr. Green's testimony under oath at the Rodnie Stewart trial. Mr. Stewart was accused, along with Mr. Schlup and Mr. O'Neal, of the crime and was tried over a year prior to Mr. Schlup. On September 5, 1984, Mr. Green testified under oath that he was in the office, heard the words "fight-fight," "got up and . . . went to the door [of the office]," could see Sergeant Flowers at the lever box, saw Dade running toward the office when Dade and Stewart collided and fell to the floor. Mr. Green said he saw no actual fight take place. He then testified that he went into the office to wait for further instructions. He made no mention in his testimony of calling "base". Thus, neither of these earlier presentations fully support Mr. Green's present statement. Indeed, there are crucial differences.

Also, Mr. Faherty has testified under oath on two prior occasions. His deposition was taken by Mr. Bushmann and the lawyers for Mr. O'Neal and Mr. Stewart on June 29, 1984, and he testified at Mr. Schlup's December 1985 trial. In both instances, Mr. Faherty has Mr. Schlup yelling out a window near the corridor to the dining room and then passing with the "first wave" of prisoners immediately into the dining room. Specifically, Mr. Faherty testified that he was temporarily on post at door T-3 located at the end of the corridor leading from the housing unit to the dining hall for only ten to fifteen

seconds. At this location and during this time period, he saw Mr. Schlup yell out the window and told Mr. Schlup to move along toward the dining room which "he [Schlup] did." Mr. Faherty testified that he also immediately moved to the dining room after his ten to fifteen second stop at T-3 because the dining room was really his assigned post. By all accounts, the walking time from T-3 to the entrance of the dining room is no more than twenty-five to thirty seconds.

Also of importance, in this context, is the testimony of Sergeant Peoples who was manning "base" during the relevant time period. He testified without equivocation that it was Captain Eberle, one of the officers posted near the scene of the murder, and not prisoner Green, who called "base" with news of the stabbing. Peoples testified that he immediately broadcast an alarm to prison officers, including those in the dining room who are seen responding to the call on the videotape.

Thus, in the record and in the discovery, a much different timing sequence is established, one that provided Mr. Schlup ample time to participate in the murder and make his way to the dining hall. This was, of course, the state's theory at the trial and a theory compatible with the jury verdict.

With the recent Faherty statement, we are asked on appeal to consider evidence that the district court did not have an opportunity to pass upon. Further, Mr. Faherty testified in Mr. Schlup's trial, as indicated, so it cannot be said that his affidavit is newly discovered evidence as were the affidavits considered in Herrera. We must also observe that in a civil context dealing with a motion for

summary judgment, we have held that we will not allow an affidavit in conflict with earlier sworn testimony to create an issue of fact. Camfield Tires, Inc. v. Michelin Tire Corp., 719 F.2d 1361 (8th Cir.1983). We believe that the same rule should apply in the context of habeas litigation, a civil action.

While it is evident that there are some inconsistencies between Mr. Faherty's affidavit and his trial testimony, for the most part, the affidavit simply is an effort to embellish and expand upon his testimony given under oath in Mr. Schlup's trial. This is not the type of newly discovered evidence contemplated in Herrera, and presents an entirely different issue of whether some seven years after a trial the court should permit witnesses to come in and add to, modify, or embellish their earlier testimony. We believe that a habeas court should not permit retrial on such a basis.

The dissent also emphasizes other parts of Mr. Schlup's present version of the facts in its attempt to advance the probability that, but for his attorney's incompetence, no reasonable jury would have found Mr. Schlup guilty of the murder. Mr. Schlup purports to present eyewitnesses who either didn't see him at the assault or who now implicate another inmate, Randy Jordan.

The dissent picks and chooses from among Mr. Schlup's several new statements and affidavits, see dissent n. 1, and finds some of them incredible because they "are too inconsistent with" the statements from some of the other newly presented eyewitnesses. The dissent also ignores or minimizes and excuses contrary statements given by some of these same individuals when the crime

was investigated prior to trial. Indeed, three of the new statements credited by the dissent, in addition to the Green affidavit, those by Lamont Griffin-Bey, Donnell White and James Pierce, are inconsistent with prior interviews given during the investigation of the crime. At that time, White and Pierce denied having witnessed the murder at all. As the dissent concedes, Griffin-Bey, who now identifies Robert O'Neal and Rodnie Stewart and finds Mr. Schlup absent from the attack, stated at the time of the contemporaneous investigation that he didn't "know none of those dudes." And, later, he refused to further comment on what happened at the time of the murder.

Thus, Mr. Schlup, like Herrera, attempts to seek a federal court retrial of his state court prosecution and falls well short of showing "by clear and convincing evidence [that] no reasonable juror would find him [guilty of murder.]" Sawyer, ___ U.S. ___, 112 S.Ct. at 2523.

B. Due Process

The second prong of Mr. Schlup's "actual innocence" allegation requires our consideration of the claim as, itself, a constitutional violation. This requirement arises from the assumption by the Supreme Court in Herrera made for the sake of deciding that particular case, "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." Herrera, ___ U.S. at ___, 113 S.Ct. at 869. This language is from Justice Rehnquist's opinion

concurred in by Justices Scalia and Thomas. Justice O'Connor in her concurrence, joined by Justice Kennedy, compared and contrasted this language with that from Justice White's concurrence and Justice Blackmun's dissent, and stated that resolution of this issue assumed by Justice Rehnquist was neither necessary nor advisable in this case. She emphasized that such "federal proceedings and relief – if they are to be had at all – are reserved for 'extraordinarily high' and 'truly persuasive demonstrations of "actual innocence" ' that cannot be presented to state authorities." Id., at ___, 113 S.Ct. at 874.[3] The decisive issue in her concurrence as well as in Justice

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[3] As the author of this opinion for that court, I express, separately, without the concurrence of Judge John R. Gibson, my belief that Mr. Schlup cannot, under the holding in Herrera, seek federal habeas relief based upon this "free standing" claim without first seeking executive clemency from the Governor of Missouri. It is my view that in Herrera, at least five members of the Supreme Court (Chief Justice Rehnquist, Justices O'Connor, Kennedy, Scalia, and Thomas) would permit a federal habeas remedy based upon an "actual innocence" claim arising from newly discovered evidence rather than trial error (assuming such a remedy even exists when the question reserved for future consideration is answered) only "if there were no state avenue open to process such a claim." Herrera, ___ U.S. at ___, 113 S.Ct. at 869, 874. While Schlup argues that the word "process" included in the Herrera formulation by the five member majority means a state court proceeding, such an interpretation is untenable given the extensive discussion of executive clemency in both the opinion of the Court authored by Chief Justice Rehnquist and the concurrence written by Justice O'Connor. Indeed, Justice O'Connor, in her discussion, of the "assume[d]" constitutional right, points out that the reserved question "may never require resolution at all" if "the safeguards of clemency and pardon fulfill their historical mission." Id., at ___, 113 S.Ct. at 874.

Rehnquist's opinion, was that the petitioner had failed to make a persuasive showing of actual innocence. Justice Rehnquist stated that the showing fell short of that which would have to be made to trigger the constitutional claim which he assumed existed.

Herrera points to the resolution of Schlup's claim. As we have just discussed in part II-A, when the new evidence itself is analyzed with its inconsistencies and weaknesses, and considered together with the evidence before the jury at the trial of the case, the extraordinarily high burden is not met, and there is no truly persuasive demonstration of actual innocence.

III.

For the reasons stated above, we conclude that the motion for stay of execution should be denied and the order of the district court affirmed.

HEANEY, Senior Circuit Judge, dissenting.

Lloyd Eugene Schlup has presented truly persuasive evidence that he is actually innocent of the murder of his fellow inmate Arthur "Stump" Dade. Five eyewitnesses to the murder have provided sworn testimony that Schlup neither participated in the murder nor was present at the time. Both Schlup and his mother begged trial counsel (and subsequent counsel) to interview inmates housed in cells near the site of the murder, but none did so. Consequently their testimony was not heard by the jury that convicted Schlup and sentenced him to death. Moreover, their testimony has not been heard in open court since the trial because neither the Missouri courts

nor the federal courts have been willing to grant Schlup an evidentiary hearing in which this new evidence could be heard and evaluated. This truly persuasive evidence of his innocence allows Schlup to clear the court-imposed procedural hurdles and to address the merits of his claim that trial counsel was ineffective for failing to interview these eyewitnesses. The court errs today in not remanding this matter for an evidentiary hearing, as it did in ruling on Schlup's first petition, and I must therefore dissent.

I

Schlup presents new evidence of his actual innocence of Dade's murder that is truly persuasive. The new evidence falls primarily into two categories. First, and most important, are the affidavits of eyewitnesses to Dade's murder which state unequivocally that Schlup was not present at and did not participate in Dade's murder. Second, Schlup presents new evidence that substantiates his videotaped alibi, i.e., that he was in the dining room at the time of the murder.

A

Schlup presents five affidavits of eyewitnesses to the murder, none of whom were contacted by Schlup's defense counsel, none of whom testified at trial, and all of whom appear willing to give their testimony in open

court.[1] These witnesses describe firsthand the murder of "Stump" Dade, indicating unequivocally that Lloyd Schlup was not a perpetrator and was not even present. This testimony not only satisfies the threshold question of "actual innocence" but persuasively demonstrates the utter ineffectiveness of Schlup's trial counsel in failing to investigate the circumstances of Dade's murder.

John Green testifies by affidavit that while standing outside the unit clerk's office the morning of February 3, 1984, he witnessed Dade's murder:

> I looked down one walk, and I saw Randy Jordan holding Arthur Dade. Jordan was standing behind Dade, and had Dade's arms pinned to his sides from behind. I saw Robert O'Neal stab Dade several times in the chest while Jordan was holding him.
>
> * * *
>
> I never saw Lloyd Schlup at the scene of the crime. . . .
>
> * * *
>
> If I had been contacted before Schlup's trial, I would have told his attorney that he was not there when Dade was stabbed. . . .

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[1] A number of other persons who stated that they were eyewitnesses to Dade's murder submitted affidavits or sworn testimony indicated that Schlup was not present at the time the murder occurred. I have not placed significant reliance on these statements either because the affiants indicate an unwillingness to testify at an evidentiary hearing or because the statements are too inconsistent with the statements of all of the other eyewitnesses (those newly presented by Schlup and those of the prosecution).

Affidavit of John L. Green, at 2, 4, 6 (Sept. 7, 1993). O'Neal has been convicted for his role in Dade's murder, as has Rodnie Stewart, whom Green also saw on "one walk" at the time. Green has been out of prison since 1986, so contrary to the state's assertion he does have something to lose by perjuring himself. He nonetheless comes forward with persuasive evidence of Schlup's innocence, evidence never heard by the jury that sentenced Schlup to death, and he deserves to be heard in open court.[2]

Donnell White was walking to the dining room "very close to" "Stump" Dade when "three white guys" came from the opposite direction:

> One of them had a tumbler of something that he threw in Stump's face. One or two of the other ones started sticking Stump with an ice-pick-type knife. They both jumped him, but I could tell for sure that one guy was stabbing him, and I'm not sure about the other guy. One broke off to the kitchen, and the other threw the knife out the window. The guy who threw the liquid in his face just backed off. The liquid was steaming, and I could smell bleach, so I think it was a mixture of bleach and boiling water. . . . I have

[2] The state argues that Green's latest affidavit is inconsistent with his testimony in the trial of Rodnie Stewart. Green then indicated that he had not seen the stabbing itself. While this inconsistency would need to be explored on remand, I believe it is fairly easily explained. Green was at that time still in prison and justifiably afraid for his well-being. See infra n. 11. It was probably in his interest to say that he had arrived just after the stabbing as he then indicated. Now that he has been out of prison for seven years, he no longer is afraid to let the truth be known.

> seen Lloyd Schlup, and I know who he is. He is definitely not one of the guys I saw jump Arthur Dade, who I knew as "Stump." I know that one of the three men involved has never been prosecuted, and I know that Lloyd Schlup is innocent.

Affidavit of Donnell D. White, at 2, 3 (Apr. 21, 1993) (emphasis added). White describes "the third guy" as "a white guy with tatoos [sic] all over his arms." Id. at 2. Lieutenant Faherty indicates that Randy Jordan was "covered" with tattoos. Affidavit of Robert Faherty, at ¶ 7 (Oct. 26, 1993). White's testimony is otherwise consistent with that of the prosecution: Rodnie Stewart was convicted for his role in Dade's murder, which consisted at least in part of throwing a cup of liquid in Dade's face. See State v. Stewart, 714 S.W.2d 724, 725-26 (Mo.Ct.App.1986).

Joseph Beck also attests to Schlup's innocence: "I witnessed the knifing of Arthur 'Stump' Dade. It happened immediately in front of my cell, 3-3 1/2 feet away. Lloyd Schlup was not in sight, not even on the flag, where stabbing took place. Never saw Schlup." Affidavit of Joseph N. Beck (Feb. 5, 1992).

James Pierce was waiting for his friend Wardell Harvey to accompany him to lunch when he witnessed Dade's murder: "I saw two white guys go onto 1-walk. One of them threw a cup of liquid in Arthur Dade's face, and the other one stabbed him. Lloyd Schlup was not involved in the stabbing." Affidavit of James Pierce, at 1 (Apr. 21, 1993). Dade was a black man, and his murder may have been racially motivated. Those involved were alleged to be members of a white supremacist group in

the prison. Pierce is also black and adds the following: "I have no reason to lie for a white guy. . . . I know for certain that Lloyd Schlup did not kill Arthur Dade, and that he was not even present when Dade was killed." Id. at 2.

LaMont Griffin-Bey was also on his way to lunch when he witnessed Dade's murder: "The first thing I saw of the fight was Rodney Stewart throw liquid in Arthur Dade's face, and O'Neal stab him. . . . Lloyd Schlup was not present at the scene of the fight." Affidavit of LaMont Griffin-Bey, at 2-3 (Apr. 7, 1993). Griffin-Bey made contemporaneous statements consistent with this affidavit. He told prison investigators that he "saw one man throw some water in his face. And when he went down the other man started hitting him with a knife." Excerpt of Transcript of Inmate Interviews, Exhibit 1A in Support of Petitioner for Writ of Habeas Corpus (interview of LaMont Griffin-Bey).

Although he failed at that time to identify either of Dade's assailants (stating initially that he "don't know none of those dudes" and later stating an unwillingness to comment on that because "this is too serious for me"), Griffin-Bey did indicate that of the two, "Sgt. Flowers grabbed one" and the other got away. Id. It is uncontroverted that Sergeant Flowers detained Stewart at the scene of the murder and that O'Neal ran to the dining room. An earlier affidavit by Griffin-Bey also supports his most recent statement: "I witnessed the knifing of Arthur Dade on [February 3, 1984]. I saw two men and the victim involved in the knifing. I did not seem Lloyd Schlup around the area and I was standing approximately 10 ft.

away from where the incident happened." Affidavit of LaMont Griffin-Bey (Jan. 21, 1992).

Each of these five eyewitnesses[3] was available to be interviewed by trial counsel had he simply noticed their depositions while he was at the prison to depose those on the prosecution's list, yet this was not done. The district court determined it was unnecessary to hear these witnesses in open court, apparently because there is "something suspect about affidavits produced after a long delay" and the "affiants are all fellow inmates who do not necessarily have a strong incentive to refrain from perjuring themselves." Schlup v. Delo, No. 4:92CV00443, slip

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[3] One additional eyewitness merits mention. According to the transcript of the inmate interviews conducted by prison investigator George Brooks, inmate Ricky McCoy asserted both that there was a "crowd of people" (indicating a generous supply of eyewitnesses to be interviewed by Schlup's trial counsel) and that "[t]here was just only two [perpetrators]. No doubt about it." He then identifies "Neal" as the man who stabbed Dade and a photo of Stewart as the man who threw the cup of water. Excerpt of Transcript of Inmate Interviews, Exhibit 2 in Support of Petitioner for Writ of Habeas Corpus (interview of Ricky McCoy). The panel opinion denying Schlup's initial appeal states that although Schlup's trial counsel reviewed the statements made by Griffin-Bey and McCoy, he decided that their "testimony would be repetitive of the testimony to be presented at trial." Schlup, 941 F.2d at 639. Given that trial counsel presented no eyewitnesses to the murder, it eludes me how their testimony could reasonably be considered repetitive. The record now before us reveals that Schlup's counsel did depose McCoy and that McCoy denied having witnessed the incident. Deposition of Ricky McCoy (June 26, 1984). No one asked McCoy about his prior statement that he had witnessed the murder. Under the circumstances counsel was required to compel McCoy's testimony. See infra at 747.

op. at 12 (E.D.Mo. Aug. 23, 1993). Of course, not all the affiants are currently fellow prisoners, as noted above,[4] but the district court's reasoning is unpersuasive in any event, given the facts of this case. The murder for which Schlup has been convicted occurred in prison. It follows that the eyewitnesses (other than the prison guards) would be fellow prisoners. These affidavits were not presented earlier because Schlup's trial counsel (and earlier post-conviction counsel) never interviewed his fellow inmates, at least two of whose statements to prison investigators revealed their status as eyewitnesses. In addition, Lieutenant Faherty indicates in his affidavit that several of these prisoners, particularly John Green and Joseph Beck, are reliable witnesses, unlike many prisoners. Affidavit of Robert Faherty, at ¶ 7 (Oct. 26, 1993). Essentially what the district court and implicitly this court require is that one wrongly convicted of a murder in prison present innocents as eyewitnesses and be able to afford competent counsel from the beginning. Schlup could, of course, do neither. Rather than discount these eyewitnesses' statements sight unseen, the district court should have granted Schlup the evidentiary hearing he requested, and then these witnesses could be subject to examination by the state and their credibility could be accurately determined.

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[4] John Green's affidavit was not part of the record before the trial court, nor was the transcript of his testimony in Rodnie Stewart's trial. The record has expanded repeatedly before our court at the request of both the parties and the court. Lieutenant Robert Faherty's affidavit has been added, as have the thirty-nine depositions (of thirty-eight individuals) taken from the prosecutor's files.

The state argues that Schlup's counsel was effective and notes specifically that he deposed thirty-eight witnesses. These depositions were done collectively by Schlup's, Stewart's, and O'Neal's attorneys, in the presence of the prosecutor, over a period extending from June 26 to July 10, 1984. Of the thirty-eight witnesses, fourteen were inmates and the remaining twenty-four were either prison personnel or other law enforcement officers. Eight of the fourteen inmates refused to answer questions, and some of them relied on the Fifth Amendment.

Other inmates were discussed during the deposition of corrections officer George Brooks, who indicated that he had interviewed all of the inmates on walks one through four and that none of these inmates had any knowledge of the incident. Deposition of George Brooks, at 9 (July 2, 1984). Schlup's counsel apparently accepted this testimony as fact and failed to interview the inmates on these walks.[5] This is ample evidence of his

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[5] No evidence in the record supports the majority's assertion that Schlup's trial counsel "arranged" for the taking of these thirty-eight depositions. It appears that the only witnesses deposed were those proffered by the state. If it is true, as the majority suggests, that trial counsel read the statements of the one hundred inmates on walks one through four, he has even less excuse for failing to interview individually Griffin-Bey and McCoy, who both told prison investigators that they had witnessed Dade's murder. Regardless of whether he read the statements he was obligated to interview these potential eyewitnesses individually. His failure to do so is the essence of Schlup's claim of ineffective assistance. Lest the point be lost in the majority's recitation of what trial counsel did do, let me repeat: at no point before, during, or after trial did Schlup's counsel interview any of the one hundred potential

ineffectiveness, but he was further ineffective in accepting inmates' statements that they would not testify because they had taken the Fifth Amendment.

Our court set the standard for attorney competence in investigating witnesses and compelling their testimony in Eldridge v. Atkins, 665 F.2d 228, 235(8th Cir.1981), cert. denied, 456 U.S. 910, 102 S.Ct. 1760, 72 L.Ed.2d 168 (1982):

> When a man's liberty is at stake counsel owes a greater duty than to simply accept someone's hearsay statement that the witness would rather not testify. A lawyer's duty to defend rises to a greater measure of responsibility. A competent lawyer's duty is to utilize every voluntary effort to persuade a witness who possesses material facts and knowledge of an event to testify and then, if unsuccessful, to subpoena him to court in order to allow the judge to use his power to persuade the witness to present material evidence.

Competent counsel are required, as indicated above, to use every means necessary to persuade these witnesses to present material evidence. A witness who pleads the Fifth Amendment

> is not exonerated from answering merely because he declares that in so doing he would incriminate himself – his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, and to require him to answer if "it clearly appears to the court that he is mistaken."

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eyewitnesses made known to him by the state. In this his representation fell below the level required by the Sixth Amendment.

Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951) (citations omitted). Schlup's counsel did not give the court that opportunity. He did not interview eyewitnesses to the murder who would have testified that Schlup was not present and did not participate, and he did not compel the testimony of those who refused to testify. His performance violated Schlup's constitutionally protected right to counsel.

In addition to the eyewitness testimony discussed above, Schlup also presents this court with new evidence in support of the alibi defense he presented at trial. That defense consisted of the testimony of several prisoners that Schlup had walked ahead of them to the dining room, the testimony of Lieutenant Faherty that he had spoken to Schlup outside the dining room, and the videotape that shows Schlup as the first inmate to arrive in the dining room.

The importance of the videotape is in the time lapse between when Schlup arrived, when the guards received a call over their radios about the attack on Dade, and when O'Neal and Jordan arrived. No one disputes that Schlup was first in line for lunch on February 3, 1984. The surveillance videotape of the dining room confirms this fact. According to the videotape, one minute and five seconds elapsed from Schlup's entrance into the dining room until the guards received a radio call about the fight. Twenty-six seconds after the guards responded to the radio call O'Neal ran into the dining room dripping blood. Prison investigator George Brooks testified at trial that one could run from the scene of the crime to the dining room in just over thirty seconds, with a brisk walk taking over a minute.

At trial it was believed that the radio call to which the dining room guards can be seen responding was made several minutes after the stabbing had occurred. Captain Eberle testified that he had radioed for help when he first arrived on the scene, which was several minutes after the stabbing. This would arguably have given Schlup time, as the state asserted in its closing arguments, to get to the dining room one minute before the call went out over the radio.

Schlup presents new evidence on this point, however, evidence that apparently was available at the time of trial but was not presented to the jury due to the ineffectiveness of Schlup's trial counsel. John Green the eyewitness whose testimony is discussed above, did more than simply watch the stabbing on February 3. Sergeant Flowers called out for someone to call the base, and Green did just that. He told the prison investigators about this phone call when he was first interviewed: "I heard Sgt. Flowers calling for officers cause they had had a fight. Couldn't get nobody so he told me to call base to notify them of the fight and that's what I did." Excerpt of Transcript of Inmate Interviews, Exhibit 4A in Support of Petition for Writ of Habeas Corpus (interview of John Green). This phone call took place just after he saw "inmate Dade fall right there in front of the office." Id.

Green's affidavit provides greater detail: "When I called base, it was within seconds of Dade hitting the ground. It could not have been more than a half minute or a minute after he was stabbed by Jordan and O'Neal. It

happened very fast." Affidavit of John L. Green, at 4 (Sept. 7, 1993).[6]

Lieutenant Faherty has also expanded on his earlier trial and deposition testimony. He testifies that he was on duty at T-3, a door about halfway between Schlup's cell and the dining room that is kept locked except when inmates are moving from one place to another. When T-3 was opened from base control at his direction, he saw Schlup "coming down the corridor. . . . He was walking a leisurely pace with his hands in his pockets." Affidavit of Robert Faherty, at ¶ 4 (Oct. 26, 1993). Schlup stopped at a window to yell at someone outside, Faherty reprimanded him, and Schlup walked to T-3. Faherty "patted him down, and he went to the dining room. [Schlup] was not perspiring or breathing hard, and he was not nervous." Id. Faherty was relieved from T-3 shortly after Schlup passed through, and Faherty then went to the dining room. He estimates that Schlup was in his presence (presumably from the corridor the other side of T-3 and into the dining room) for two-and-a-half to three minutes. It

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[6] Sergeant Peoples, who was the dispatcher at base control at the time of the stabbing, indicated that he had been called by Captain Eberly. Deposition of Ellis R. Peoples, at 9-10 (July 5, 1984). He was not asked about John Green or whether any inmate had called in the fight. He did testify that he kept a log of this incident, and Lieutenant Faherty likewise testified in his deposition of the existence of certain logs. None of these appear in the record, and there is no evidence that they were ever examined by Schlup's trial counsel. One of the difficulties in this case is ascertaining absolute times (it all occurred "about noon"), and these logs would seem to be useful in this regard. The absence of these logs is but further evidence of the ineffectiveness of Schlup's trial counsel.

would take Schlup another thirty seconds to walk from his cell to where he first entered Faherty's line of sight. Id. at ¶ 6. Counting the minute in the dining room prior to the radio call (when he was presumably in Faherty's presence as well), Schlup left his walk at least three to three-and-a-half minutes before the radio call.[7] If the radio call came in response to John Green's phone call, it is impossible, as Faherty asserts, for Schlup to have participated in Dade's murder.

Given the timing of this call for help and the evidence presented at trial (the videotape, the testimony of Lieutenant Faherty, and the testimony of Brooks on how long it takes to move from the scene of the crime to the dining room), it is not possible that Schlup could have participated in Dade's murder and been in the dining room as the videotape indicates. In short, Lloyd Schlup could not have been in two places at the same time. O'Neal arrived nearly thirty seconds after the radio call, and the prosecution's testimony establishes that he took off at a run. He was followed into the dining room by Randy Jordan. Rodnie Stewart had already been detained.

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[7] Faherty indicates in his affidavit that it must have been five to five-and-a-half minutes from the time Schlup left his cell to the time of the radio call. This is somewhat inconsistent with the details of both his affidavit and his earlier trial testimony and deposition. Any inconsistency should be explored, and perhaps explained, at an evidentiary hearing. One need only rely on the most conservative estimate of a three-minute lapse to conclude that Schlup could not have participated in Dade's murder.

Meanwhile, as Schlup has maintained since the beginning, he was simply in the dining room eating his fish sandwich.

II

Despite the weight of this new evidence, the court refuses to reach the merits of Schlup's claim that his counsel was ineffective by declaring the issue subject to procedural bar. The procedural hurdles habeas petitioners must clear stem from two sorts of concerns. First, we wish to insure that state courts are given an opportunity to review such claims before we will review them ourselves, and second, we feel that late-blooming claims of error that could have been raised earlier are little more than dilatory tactics by petitioner's counsel. Neither concern is implicated in this case because Schlup has asserted since the beginning that his trial counsel was ineffective for failing to interview eyewitnesses to Dade's murder.

A

Schlup was convicted on December 11, 1985, after a two-day trial.[8] His conviction was affirmed on February

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[8] The state asserted at oral argument that we should not "retry" this case on habeas and asked what we would tell the jury that sat through this two-week or three-week long trial, implying that we would somehow be showing disrespect to the jury if we found that Schlup deserved a new trial because of trial counsel's failure to present that very jury with exculpatory witnesses. I repeat that Schlup received only a two-day trial. Had trial counsel presented the exculpatory eyewitnesses now

17, 1987, by the Missouri Supreme Court and the United States Supreme Court denied certiorari on June 8 of that year. See State v. Schlup, 724 S.W.2d 236 (Mo.), cert. denied, 482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed.2d 685 (1987). Less then six weeks later Schlup filed for post-conviction relief in the Missouri courts under Rule 27.26 as it then existed. This was the first opportunity that Schlup had to raise the ineffectiveness of his trial counsel because no record had been made which would allow the issue to be raised on direct appeal. Schlup raised the issue loudly and clearly, alleging that his trial counsel was constitutionally ineffective in that he "failed to interview witnesses in support of [his] defense including Robert O'Neal, Van Robinson, Lamont Griffin and Ricky McCoy, who were witnesses to the crime of which Petitioner was convicted, and who would have testified that Petitioner was not one of the three inmates involved." Rule 27.26 Motion at 2, Schlup v. State, No. CV187-3457CC (Circuit Court of St. Charles County, Mo., filed July 18, 1987). Schlup also alleged that his "counsel failed to investigate Petitioner's alibi defense and failed to interview Randy Jordan, who Petitioner believes was in fact the third participant in the murder of which Petitioner was convicted." Id. at 3.

An evidentiary hearing was held at which Schlup's trial counsel testified, and the motion court ruled against Schlup, finding that his trial counsel had been effective. See Schlup v. State, No. CV187-3457CC (Circuit Court of

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presented, the jury would have received the full picture of Dade's murder, and if it were to credit the new evidence, it would have no choice but to acquit.

St. Charles County, Mo., Nov. 6, 1987). The court accepted trial counsel's testimony, and found that the witnesses who were not interviewed were either not made known to trial counsel by Schlup or "were known not to have information which would assist the defense." Id. at 4.

Schlup appealed this adverse decision, specifically alleging that trial counsel was ineffective for not interviewing the aforementioned witnesses. Appellant's Brief at 4, Schlup v. State, 758 S.W.2d 715 (Mo.1988)(No. 70694). The Supreme Court of Missouri ignored this issue when it affirmed the motion court's decision. See Schlup v. State, 758 S.W.2d 715 (Mo.1988) (en banc).

Schlup then raised the issue in his pro se petition for federal habeas filed in the Eastern District of Missouri. His handwritten petition alleges that trial counsel "[d]id not interview inmate John Green; who was the inmate 'clerk' and gave statement to investigators that he put out the phone call to base control." His amended petition prepared by counsel restated the language of the 27.26 motion, alleging that "Petitioner's trial counsel . . . failed to interview witnesses in support of [the] defense including Robert O'Neal, Van Robinson, Lamont Griffin and Ricky McCoy, who were witnesses to the crime of which petitioner was convicted, and who would have testified that Petitioner was not one of the three inmates involved." First Amended Petition, Attachment to 11(a)(3) at 1 (¶ A(1)), Schlup v. Armontrout, No. 89-0020C(3) (E.D.Mo. filed March 7, 1989). Schlup also alleged ineffectiveness of trial counsel for failure to call "those persons who would have testified that Petitioner was not the third inmate involved in the murder of which he was convicted" including the aforementioned. Id. at 2

(¶ A(5)). Counsel raised this issue in the briefs filed with the district court as well. See Petitioner's Brief at 9-10, Schlup v. Armontrout, No. 89-0020C(3) (E.D.Mo. May 31, 1989).

The district court ruled summarily and without any basis that the claims raised in paragraphs A(1) and A(5), along with others, were "barred from further consideration" because of Schlup's failure to assert them at trial, to include them in his motion for new trial, to brief them on appeal, or to pursue them in [his] post-conviction proceedings." Schlup v. Armontrout, No. 89-0020C(3), slip op. at 6 (E.D.Mo. May 31, 1989), aff'd, 945 F.2d 1062 (8th Cir.1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1273, 117 L.Ed.2d 499 (1992).

Schlup appealed to our court, again arguing that trial counsel had been ineffective for "fail[ing] to investigate and call witnesses, including alibi witnesses, in petitioner's case in chief." Appellant's Brief at 18, Schlup v. Armontrout, 945 F.2d 1062 (8th Cir.1991) (No. 90-1164EM). Rather than remand the matter to the district court so that it could make the initial determination on the merits (and perhaps conduct the evidentiary hearing that Schlup has never had in federal court), we addressed the merits of his claims and found them wanting.

Had we fully explored the alleged procedural default, we would have found it to be nonexistent. Schlup raised the issue to the Circuit Court of St. Charles County, Missouri, and to the Supreme Court of Missouri, but because the Missouri Supreme Court failed to address the issue the district court ruled that Schlup had failed to raise it in that forum. The Missouri Supreme Court's error

was attributed to Schlup, and our ruling only compounded the injustice.

B

We erred in not remanding the case to the district court two years ago. Had we done so, his present counsel, who was appointed immediately following our prior ruling and who is the only truly competent counsel to have represented Schlup since the beginning, would have had an opportunity to develop the record we now have before us and this claim could have been addressed on the merits by the district court as it should have been in the first place.

The only procedural hurdle that remains in Schlup's path is our affirmance of the district court's error in failing to address this claim when it was first presented. There are two routes around this procedural bar. The route pursued in the briefs is the actual innocence or fundamental miscarriage of justice exception to bar, but that exception normally is pursued when the failure to raise the claim earlier can be traced to the petitioner. In this case the fault lies with the federal courts, and the second route around this bar can be remedied most sensibly by this federal court. Justice requires that we correct our prior decision, which we can do by recalling the mandate and remanding the initial petition to the district court for an evidentiary hearing on the merits of the ineffective assistance claim. Recall of the mandate is authorized "to prevent injustice," 8th Cir.R. 41A, and we have done so in the death penalty context in the past. See Simmons v. Lockhart, 856 F.2d 1144 (8th Cir.1988). Schlup

has asserted that trial counsel was ineffective for failing to interview eyewitnesses since the beginning, and it is time that his evidence to support that claim be heard in open court.

III

If we do not recall our prior mandate, Schlup's claims are barred as either successive, abusive, or procedurally defaulted, see Sawyer v. Whitley, ___ U.S. ___, ___, 112 S.Ct. 2514, 2518, 120 L.Ed.2d 269 (1992), but exceptions must be made if a petitioner adequately asserts either cause and prejudice or a fundamental miscarriage of justice, which is also known as the "actual innocence" exception. See id., at ___, 112 S.Ct. at 2518-19. If the evidence Schlup has presented were to stand up in an evidentiary hearing, it would satisfy the actual innocence standard, and we should therefore address the merits of his claim that his counsel was constitutionally ineffective during the guilt phase of his trial. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

A

Under the Supreme Court's decisions on actual innocence, the standard to be applied in this case is stated in Kuhlmann v. Wilson, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986), in which Justice Powell stated the requirement that

> the prisoner must "show a fair probability that, in light of all the evidence, . . . the trier of fact would have entertained a reasonable doubt of his guilt." Thus, the question whether the prisoner can make the requisite showing must be determined by reference to all probative evidence of guilt or innocence.

Id. at 454 n. 17, 106 S.Ct. at 2627 n. 17 (Powell, J., for a plurality) (quoting Henry Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U.Chi.L.Rev. 142, 160 (1970) (footnote omitted)) (emphasis in original). I believe that Schlup has met this standard, but as the majority correctly notes, our court has applied a different standard, essentially reading the Supreme Court's decision in Sawyer as implicitly overruling Kuhlmann in this regard.

In Sawyer, the Supreme Court affirmed the Fifth Circuit, quoting with approval the test adopted by that court:

> "[W]e must require the petitioner to show, based on the evidence proffered plus all record evidence, a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty."

Sawyer, ___ U.S. at ___, 112 S.Ct. at 2523 (quoting Sawyer v. Whitley, 945 F.2d 812, 820 (5th Cir.1991)). The Court then restated the test, changing it markedly in the process, in what has become an all too common sleight-of-hand. Despite its praise for the Fifth Circuit standard (which comes, of course, from Kuhlmann), the Court now requires that one arguing innocence of the death penalty

provide "clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty." Id. I also believe that Schlup has satisfied this test, which our court has sua sponte, and in my view erroneously, extended to apply to convictions as well as to sentences. See Appellants' Briefs in Cornell v. Nix, 976 F.2d 376 (8th Cir.1992) (en banc) and McCoy v. Lockhart, 969 F.2d 649 (8th Cir.1992), neither of which argue for the extension of Sawyer. The Fifth Circuit, which was affirmed by the Supreme Court in Sawyer, has not extended that ruling to convictions, ruling instead that the Kuhlmann standard continues to apply to convictions. See Montoya v. Collins, 988 F.2d 11, 13 (5th Cir.) (restricting Sawyer to the sentencing phase and continuing to apply Kuhlmann to the guilt phase), cert. denied, ___ U.S. ___, 113 S.Ct. 1630, ___ L.Ed.2d ___ (1993).

As a panel we are of course bound by Cornell, but if ever there were a case in which the Supreme Court might wish to clarify the law on this issue, this is the one. Schlup has presented a strong case of actual innocence. I believe it meets the Cornell standard, and I believe it is "truly persuasive" as required by Herrera v. Collins, ___ U.S. ___, 113 S.Ct. 853, 869, 122 L.Ed.2d 203 (1993), but the majority does not. What either the majority or the district court, which noted that Schlup presented a stronger case of actual innocence than did Herrera (and the evidence has only increased since the district court's decision), would do if Schlup were simply required to show a "fair probability" of his innocence is not known, but only our court en banc or the Supreme Court can make that happen.

B

Once Schlup clears the procedural hurdles put in place by this court and the Supreme Court, the merits of his claim of ineffective assistance of counsel must be addressed. Schlup alleges that trial counsel's failure to conduct a reasonable investigation of the circumstances surrounding the murder deprived him of his rights under the Sixth Amendment. See Strickland, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Petitioners alleging ineffective assistance of counsel must show both that counsel's performance failed to meet "the standard of reasonableness under prevailing professional norms" and that "but for counsel's ineffective assistance there is a reasonable probability that the result of the trial would have been different." Grooms v. Solem, 923 F.2d 88, 90 (8th Cir.1991). The test for prejudice is substantially easier to satisfy than is the test for actual innocence (which I have already indicated Schlup's evidence satisfies), so the only remaining question is whether the newly presented evidence could, and should, have been discovered by competent trial counsel.

Despite having access to transcripts of prisoner interviews, some of which contained statements of eyewitnesses, Schlup's counsel failed to conduct any reasonable investigation.[9] This court has held repeatedly that failure

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[9] Schlup's trial counsel apparently failed even to inquire of Stewart's and O'Neal's counsel about potential eyewitnesses. Both of these trials took place before Schlup's and both defense counsel presented eyewitnesses to Dade's murder. Some of those witnesses might not have helped directly, but counsel would have at least become aware that the crime occurred in a

to interview potential alibi witnesses constitutes a lack of competence under Strickland. See, e.g., Grooms, 923 F.2d at 91; Lawrence v. Armontrout, 900 F.2d 127, 129-30 (8th Cir.1990). Failure to interview potential eye witnesses is unquestionably a more egregious failing than failure to interview alibi witnesses. In this case, Schlup offers both eyewitnesses and, at least indirectly, an alibi witness, all of whom would have been uncovered by a reasonable investigation of the circumstances surrounding Dade's murder.

John Green's statement that he had called the base, a statement that certainly would have bolstered Schlup's alibi, was available to Trial counsel in the transcript of prisoner interviews conducted by Brooks.[10] Had counsel then interviewed Green, he could have asked the question that none of the transcripts of prisoner interviews reveals to have been asked of any prisoner: Was Lloyd Schlup present at Dade's murder?[11] counsel would have

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crowded cellblock and that the possibility of eyewitnesses should be investigated.

[10] I assume that transcripts of the prisoner interviews were available to trial counsel. Were they unavailable, Schlup is entitled to relief under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1967), due to the prosecution's failure to turn over such exculpatory evidence in violation of due process.

[11] George Brooks indicated in his deposition that he only asked the inmates if they had witnessed Dade's murder or anything else unusual on that date. In short, the inmates were being asked by prison guards to "snitch" on fellow inmates when the eyewitnesses were all too aware that the guards were in no position to provide protection from the perpetrators and their cronies. This murder took place in the Special Management Unit, also known as "SuperMax," yet even prison personnel

had further incentive to interview McCoy[12] and Griffin-Bey, who both admitted to prison investigators that they witnessed the crime. They too could have been asked whether Schlup was present.

Even if counsel were not made aware either by Schlup or by prison authorities that there were witnesses to the murder, he was obligated simply by common sense to investigate the possibility. This murder occurred as prisoners were being released from their cells to go to lunch. The existence of witnesses to the murder was as inevitable as their reluctance to cooperate either with prison investigators or with a room full of lawyers and O'Neal.[13] Counsel's failure to investigate these witnesses and the other eyewitnesses was unreasonable under our

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were fearful of appearing in this area alone. See Deposition of William Rutledge, Associate Warden, at 16, 19 (June 29, 1984). The latest inmate affidavits indicate that they too were afraid to travel alone even to lunch, as evidenced by several of them waiting for friends before walking to the dining room.

[12] Counsel did depose McCoy but the record indicates no effort to interview him outside of the presence of the prosecutor or O'Neal. One purpose of such an interview might have been to reconcile his deposition with his earlier statement to prison investigators. See supra n. 3. Schlup's counsel informs us that McCoy is now dead, so I presume no further explanation will be forthcoming.

[13] Several of the depositions of inmates who refused to answer questions reflect the prosecutor's belief that O'Neal was responsible for the inmates' reticence. It seems quite likely that an interview in O'Neal's presence would not be the most conducive environment in which to gain the cooperation of eyewitnesses, yet the record reveals that Schlup's counsel made no effort to contact eyewitnesses (as opposed to alibi witnesses) individually.

case law, and Schlup is therefore entitled to relief if these witnesses' testimony were to survive the rigors of an evidentiary hearing.

IV

Under Delo v. Blair, ___ U.S. ___, 113 S.Ct. 2922, 125 L.Ed.2d 751 (1993) (per curiam), all that is required for a stay to issue on a second or subsequent habeas petition is that the petitioner present " 'substantial grounds upon which relief might be granted.' " Id. at ___, 113 S.Ct. at 2923 (quoting Herrera v. Collins, ___ U.S. at ___, 113 S.Ct. 853, 873, 122 L.Ed.2d 203 (1993) (O'Connor, J., concurring)). In Blair, the Court objected to the issuance of a stay because the district court had stated that the facts in that case mirrored those that the Court had recently rejected in Herrera. This case is distinguishable on a number of grounds.

First, Schlup is not relying exclusively on a constitutional claim of actual innocence, but is using innocence as a gateway to reach the merits of his ineffective assistance claim. Second, the district court indicated that Schlup has presented a stronger case than did Herrera in that Schlup's affidavits do not consist of hearsay but of eyewitness testimony, and Herrera was, in the opinion of the district court, "convicted on the basis of a larger quantity of evidence than was presented at [Schlup]'s trial." Schlup v. Delo, No. 4:92CV00443, slip op. at 11 (E.D.Mo. Aug. 23, 1993).[14] Third, those affidavits presented by

[14] The only significant evidence presented by the state at Schlup's trial was the testimony of two prison guards who gave conflicting statements as to the details but who both testified that Schlup was the third participant with O'Neal and Stewart. Unlike O'Neal, whose clothing was covered with Dade's blood, no physical evidence linked Schlup to this crime. Neither guard has ever been asked about Randy Jordan, whom Schlup asserts was the prison "snitch." In addition, Schlup's counsel informed us during oral argument that one of the two prison guards has, and had at the time of Schlup's trial, a criminal record that includes three felonies. Under Missouri law, these felonies, though not of recent origin, could have been introduced to impeach Maylee if trial counsel had only conducted sufficient investigation to uncover their existence. The record reveals no evidence that such an inquiry took place, and the jury was consequently deprived of this evidence as well.

Schlup that identify the actual perpetrator point to Randy Jordan, whose whereabouts are presently unknown but, unlike in Herrera and Blair, who is not known to be deceased. And fourth, Schlup has maintained his innocence since the beginning, while both Blair and Herrera had, knowingly and voluntarily or not, confessed. Schlup presents a much stronger case of actual innocence than did either Blair or Herrera. The present petition presents substantial grounds upon which relief might be granted, and we should therefore stay Schlup's execution and remand this case to the district court for an evidentiary hearing.

V

The legal rulings by this court and by the district court place Lloyd Schlup in an inextricable bind. Why the court asks, did you not present this evidence sooner? Because my earlier counsel failed to conduct a reasonable investigation, Schlup responds. Why then do you not

present us with pillars of the community to prove your innocence? Because the crime occurred in prison, he replies, and few pillars of the community occupy prison cells. That, says the court, is unfortunate, for absent virtuous eyewitnesses or a time machine, there is nothing we can do. Just as the Ninth Circuit told Henry Deutscher in regard to his death sentence,[15] this court tells Lloyd Schlup in regard to his conviction: You may indeed be innocent, but you are not innocent enough early enough.

Justice requires that we remand this matter to the United States District Court for an evidentiary hearing.

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

ORDER
November 17, 1993.

The suggestion for rehearing en banc and the motion for stay of execution are denied. Chief Judge Arnold, Judge McMillian, and Judge Wollman would grant the suggestion and the motion.

RICHARD S. ARNOLD, Chief Judge, dissenting, joined by McMILLIAN and WOLLMAN, Circuit Judges.

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[15] See Deutscher v. Whitley, 991 F.2d 605, 606 (9th Cir.1993) (holding that although Deutscher had "shown to [the court's] satisfaction that it is more probable than not that, but for his constitutionally deficient counsel, he would not have been sentenced to die," he nonetheless did not satisfy the new standard set by the Supreme Court in Sawyer, and consequently did not merit relief).

I would grant the suggestion for rehearing en banc to consider two questions raised by the petitioner Lloyd Schlup.

1. Schlup argues that he is actually innocent of the crime of capital murder in the sense necessary to enable this Court to avoid the state's procedural defenses and reach the merits of his contention that his trial counsel was ineffective. In assessing this claim, our panel applied the rule of McCoy v. Lockhart, 969 F.2d 649 (8th Cir.1992). In McCoy, we held that a miscarriage of justice for purposes of avoiding procedural defenses can be found only when petitioner has shown by clear and convincing evidence that but for the constitutional error, no reasonable juror could find him guilty. 969 F.2d at 651. The McCoy court lifted this standard from Sawyer v. Whitley, ___ U.S. ___, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992), a case having to do only with the question of punishment, not that of guilt or innocence.

As our panel in the present case acknowledged there is some warrant for Schlup's argument that Sawyer was intended by the Supreme Court to apply only to questions of punishment, and that the Sawyer opinion itself preserves unchanged, for purposes of the guilt-phase, the earlier standard of Kuhlmann v. Wilson, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986) (requiring a petitioner to show a fair probability that, in light of all the evidence, the jury would have entertained a reasonable doubt of his guilt). See Sawyer, ___ U.S. at ___ n. 5, 112 S.Ct. at 2519 n. 5.

Our panel did what it had to do. It was bound to follow McCoy and it did not, as a panel, err in doing so. It

seems to me, though, that there is a substantial question whether McCoy correctly interpreted Sawyer. This is a question of great importance in habeas corpus jurisprudence, and I believe it qualifies as deserving of this Court's en banc time.

2. Petitioner raises another "innocence" issue – this one an independent ground for habeas relief, rather than just a gateway through which procedural defenses can be avoided. As I understand the various opinions in Herrera v. Collins, ___ U.S. ___, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), a majority of the Court appears to believe that, in a sufficiently strong case, innocence would be a ground for habeas relief. The case would have to be "truly persuasive" and "extraordinary." We know that these standards were not met in Herrera itself or in Delo v. Blair, ___ U.S. ___, 113 S.Ct. 2922, 125 L.Ed.2d 751 (1993) (per curiam). In Blair, a stay of execution was dissolved on the ground that the evidence of innocence was no more persuasive than that presented in Herrera.

In my view, it is likely that Schlup's evidence of innocence is substantially more persuasive than Herrera's or Blair's. I am not nearly so familiar with the record as the members of the panel, but Judge Heaney's dissent convinces me that there is at least a substantial likelihood that a trier of fact would consider Schlup's evidence sufficiently persuasive to meet the high Herrera standard if an evidentiary hearing were held. To be sure, there are contradictions in both sides' evidence, and I agree with the panel that, even after all of the new evidence is considered, a reasonable jury could still find Schlup guilty. In this sense, the Herrera standard seems easier to meet than the Sawyer standard, which is quite close to

that of Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In other words, under Herrera, if evidence is newly discovered, a habeas petitioner could obtain relief by making a "truly persuasive" or "extraordinary" case, even if, after considering the new evidence, a reasonable jury could still convict him.

This, at any rate, seems to me the present state of the law. If I am right, Schlup may have a substantial ground for relief. Whether he does not is admittedly a fact-intensive question, not the sort of thing of which en banc proceedings are normally made. But where human life is at stake, I believe rehearing en banc is appropriate whenever a petitioner makes a substantial claim, even if it is fact-specific.

For these reasons, I would grant the suggestion for rehearing en banc, and I respectfully dissent from the order denying it.

Supreme Court of the United States

No. 93-7901

Lloyd Schlup,
Petitioner

v.

Paul K. Delo, Superintendent, Potosi
Correctional Center

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Eighth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Questions 1 and 2 presented by the petition.

March 28, 1994

Supreme Court, U.S.
FILED
MAY 31 1994
OFFICE OF THE CLERK

No. 93-7901

In The

Supreme Court of the United States

October Term, 1993

LLOYD E. SCHLUP, JR.,

Petitioner,

v.

PAUL DELO, Superintendent,
Potosi Correctional Center,

Respondent.

On Writ Of Certiorari To The Eighth Circuit Court Of Appeals

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QUESTIONS PRESENTED

1. Whether the standard of *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992) or the standard of *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), defines the kind of miscarriage of justice which permits the consideration of an otherwise-barred constitutional claim regarding the determination of guilt or innocence in a capital case.

2. Whether, if *Sawyer's* standard applies, it requires a habeas petitioner to show that the evidence of guilt was constitutionally insufficient to support conviction.

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The opinion of the divided panel of the United States Court of Appeals for the Eighth Circuit is published as *Schlup v. Delo*, 11 F.3d 738 (8th Cir. 1993); it is set out in full in the Joint Appendix. JA 131-172. The Order of the Court of Appeals denying Petitioner's Suggestion for Rehearing *En Banc*, with a dissent by Chief Judge Arnold and two other judges, is appended to the panel opinion in the Federal Reporter and in the Joint Appendix. JA 172-175. The decision of the United States District Court for the Western District of Missouri dismissing the habeas petition is unpublished; it appears in the Joint Appendix at JA 68-88. The order of the District Court denying Petitioner's motion to amend under CR 59(e) appears at JA 130.

JURISDICTION

The decision of the Court of Appeals was issued on November 15, 1993. A Petition for Rehearing *En Banc* was denied on November 17, 1993. JA 131. The Petition for Writ of Certiorari was timely filed on Monday, February 14, 1994.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the United States Constitution, which provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves 28 U.S.C. § 2244(b), which provides:

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the

> merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the other application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

This case also involves Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts, which provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

STATEMENT OF THE CASE

Petitioner Lloyd Schlup was convicted and sentenced to death for the February 3, 1984 murder of Arthur Dade, a fellow prisoner at the Missouri State Penitentiary. The murder occurred on "1 Walk"[1] in Housing Unit 5A of the penitentiary,

---

[1] There are four floors in Housing Unit 5. On each floor are two rows of cells, one facing north and one facing south. Each row of cells is called a "walk." There are approximately 22 cells on each walk. (A diagram of the housing unit was admitted into evidence at trial, but was placed under seal in the District Court. A schematic roughly showing the relative locations of the cells of the various prisoners involved is attached as Exhibit A.)

as the inmates were being released from their cells for lunch. JA 68.

Mr. Schlup was arrested in the prison dining room within five minutes of the murder, but no physical evidence linked him with the crime. Although Dade was repeatedly stabbed, laboratory tests of Schlup's shoes and clothing revealed no trace of blood. JA 105.

A videotape from a surveillance camera in the prison dining room, two floors and several hundred feet from the scene of the crime, shows that Schlup was the first of several inmates to walk into the dining room and get in line for lunch. JA 12. The videotape also shows that approximately one minute and five seconds after Schlup entered the dining room, several guards ran out of the room, in obvious response to a radio distress call. JA 97. Twenty-six seconds after the guards had run out of the room, the tape shows one of Dade's killers, Robert O'Neal, run into the dining room, dripping blood. JA 97, 155. Rather than go through the lunch line, O'Neal cuts to the right and runs around the side of the dining room to a back table. JA 97. Randy Jordan – the man Petitioner's evidence shows actually assisted O'Neal in the murder – follows O'Neal into the dining room and sits beside him. JA 96.

Although the videotape was presented to the jury at trial, the prosecution argued that Schlup had time to participate in the stabbing and then run to the dining room by the time the tape shows him there. JA 36. There was abundant evidence that Schlup did not and could not have done that – most notably, the testimony of a corrections lieutenant who saw Schlup walk to the dining room and searched Schlup before he entered it, JA 157-58 – but the jury never heard most of this evidence. Nor did the jury hear from any of the inmate eyewitnesses to the stabbing – including friends of Dade who had no reason to lie to help his murderer – every one of whom swears Schlup was not involved.

This evidence was never placed before any court until the successive federal habeas petition was filed in the District Court below. The petition alleged that the evidence was not previously presented because Lloyd Schlup's appointed trial lawyer did not investigate the case, the prosecution did not disclose exculpatory evidence in its possession, and Schlup's appointed counsel in his state postconviction and first federal habeas petitions failed to do the investigation that Schlup and his family implored them to do. JA 145. The courts below found that none of that constituted "cause" permitting Schlup to relitigate his constitutional claims, and that Schlup had not shown that a bar to those claims would result in a fundamental miscarriage of justice.

1. The Evidence at Trial.

Three inmates were charged with Arthur Dade's murder: Rodney Stewart, who was caught at the scene; Robert O'Neal; and Lloyd Schlup. The three were tried separately; Schlup was the last of the three to be tried. JA 68-69. His trial lasted a total of two days. JA 159.

The only real evidence against Schlup at trial came from two corrections officers who claimed to have seen the murder. Only one of these witnesses, Sgt. Roger Flowers, appeared before the jury; the testimony of the other, Officer John Maylee, was presented by deposition. JA 79.

Sgt. Flowers testified that, as the inmates were leaving 1 Walk for lunch, he saw Rodney Stewart, an inmate from 2 Walk, walking against the flow of traffic and carrying a cup of what appeared to be steaming liquid, which he threw in Arthur Dade's face. As Dade put his hands over his face, Flowers said he saw Robert O'Neal and Lloyd Schlup attack Dade from behind. Trial transcript (Tr.) 242. Flowers testified that all four inmates fell to the ground, and he shouted for help and then went onto the Walk to break up the fight. Tr. 243. He said he grabbed Stewart, and O'Neal and Schlup fled, but that he did not see where they went. Tr. 244; JA 35. He then took Stewart downstairs, where he met Captain James Eberle. Tr. 245. Capt. Eberle testified that he then went up to

the housing unit, saw Dade being put on a stretcher,[2] and called for assistance on his radio. Tr. 209; JA 35.

Officer John Maylee's deposition told a somewhat different story. Maylee said that he was on the very top level of the four-story housing unit when he saw O'Neal, Stewart and Schlup running together toward Dade. Tr. 332. He said that Stewart threw something in Dade's face, and then Stewart and Schlup held Dade while O'Neal stabbed him. Tr. 342. According to Maylee, only Dade fell to the ground. Tr. 338. Although Maylee claimed he saw the whole fight, he said he did not see Sgt. Flowers at all. Tr. 338-39, 356.

The prosecution sought to square this testimony with the videotape of Schlup in the dining room by arguing that the stabbing took place two to three minutes before Schlup appears on the tape. The key to this prosecution theory was the radio call to which the videotape shows the officers in the dining room responding, a minute and five seconds after Schlup enters the room. The prosecution theory was that this call must have been made by Captain Eberle, because he was the first officer to arrive at the scene with a radio. Tr. 209.[3] Tr. 208. Eberle testified he went to the scene of the stabbing after he saw Flowers with Stewart, downstairs. At Schlup's trial, Flowers said it took him up to two minutes to get Stewart under control,[4] and Eberle estimated it took him a minute to climb the stairs.[5] A prison investigator testified that he had measured the time required to travel from the housing

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[2] In Roger Flowers' first deposition, he stated twice that Arthur Dade was taken from the housing unit on a stretcher *before* he went downstairs and notified Captain Eberle there was trouble in the housing unit. See note 19, below. This was not brought out at Schlup's trial.

[3] The jury was not informed that there was a telephone a few feet away, which Inmate Clerk John Green told investigators he had used to call base and report the fight. JA 91.

[4] At O'Neal's trial, Flowers testified it took "probably less than a minute or two."

[5] Officer Curtis Bittle testified he ran almost 300 feet, and then climbed these same stairs in 20-30 seconds. Tr. 138; *see also* JA 35 n.8.

unit to the dining room: a little over a half a minute running, one minute seven seconds walking briskly, and one minute thirty-seven seconds walking at a leisurely pace. Tr. 463-66. That made it possible, the prosecutor argued, for Schlup to assist in the murder, run past all of the other prisoners, and enter the dining room a minute before the distress call went out. JA 35-36.

The defense presented the jury with nothing contradicting this. Its case consisted primarily of the videotape and the testimony of inmates Bernard Bailey and Arthur St. Peter, who occupied cells close to Schlup's. They testified that when 2 Walk was opened for lunch, they followed Schlup directly to the dining room. Tr. 445-46, 456-57.[6] The only other witness called by the defense was a caseworker, Oscar Dunbar, who notarized a document for Schlup in his cell, about one-half hour before the killing; the defense theory (which the prosecutor mocked in closing argument, Tr. 501) was that Sgt. Flowers must have escorted Dunbar to Schlup's cell, and therefore had "a mind set of Lloyd Schlup." Tr. 494. Defense counsel did not call Schlup,[7] or any of the several other inmates the videotape showed in the dining room with him, to testify about what they had seen.

After submitting several questions to the court regarding the evidence and the physical layout of the prison – and asking for, but being refused, the officers' incident reports, which were not in evidence, Tr. 512 – the jury convicted Lloyd Schlup of Arthur Dade's murder. JA 116. Later the same day – after hearing Schlup take the stand and swear that

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[6] The videotape shows the two men enter the dining room and wait in line behind Schlup. Tr. 419-20.

[7] Schlup had two prior assault convictions which were inadmissible at the guilt phase, except as impeachment. Counsel sought unsuccessfully to have admitted the statement Schlup gave to investigators on the day of his arrest, in which he denied any involvement in the murder, and said that he had gone directly from his cell to the dining room because he planned to play handball after lunch. JA 104-06. A handball was found in Schlup's pocket when he was arrested. JA 105.

he had not committed the murder of which he had just been found guilty – it sentenced him to death. JA 14.

On March 3, 1986, at the formal sentencing, Schlup was asked if he had any statement to make before sentence was pronounced. He answered, "I'd just like to say that I'm not guilty of this crime, that I had no knowledge or participation in this killing. . . . The trial – I've already been found guilty of this so it's a matter for the Appeals Court, I guess." Tr. 690. The judge then imposed the sentence of death. Tr. 689-90.

2. The First State and Federal Postconviction Proceedings.

The conviction and sentence were affirmed on appeal. *State v. Schlup*, 724 S.W.2d 236 (Mo.), *cert. denied*, 482 U.S. 920 (1987).

Schlup then filed *pro se* for postconviction relief in the Missouri courts claiming, among other things, ineffectiveness of his trial counsel. New counsel, Mark Kempton, was appointed to represent him in these state proceedings. Schlup and his family asked Kempton specifically and repeatedly to investigate the case; but by his own admission, Kempton never contacted any witness to the crime or to Schlup's whereabouts at the time it was committed. JA 72-73, 113. The postconviction petition was dismissed after a one day hearing, which went forward despite Kempton's request for more time because he had not investigated the case.[8] Without hearing

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[8] In his verified motion for continuance, Kempton stated:

> . . . [Schlup] has specifically requested and directed counsel to locate, interview and depose certain witnesses who Petitioner believes to have relevant and material information and evidence concerning Petitioner's claims herein.
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> * * * *
>
> That counsel for petitioner has not had sufficient and adequate time to conduct investigation and discovery which Petitioner has requested and which counsel believes is necessary to the proper presentation of the issues herein.
>
> * * * *

any of Schlup's exculpatory evidence, the state postconviction judge held that trial counsel had been effective and dismissed the petition. See *Schlup v. State*, No. CV187-3457CC (Circuit Court of St. Charles County, Mo., Nov. 6, 1987). On appeal, the Supreme Court of Missouri affirmed without addressing the issue. See *Schlup v. State*, 758 S.W.2d 715 (Mo. 1988).

Schlup then filed a *pro se* petition for federal habeas in the United States District Court for the Eastern District of Missouri. Again, he was given appointed counsel, David Howard. Again, Schlup and his family begged Howard to investigate, and provided him with names of witnesses who could attest to Schlup's innocence. Again, counsel talked to none of these witnesses[9] and submitted no new evidence casting doubt on his client's guilt. JA 145.

The District Court never addressed the merits of Schlup's ineffectiveness claim. Instead it incorrectly included the ineffectiveness issue among claims that it ruled summarily were procedurally barred because of Schlup's "failure to assert them at trial, to include them in his motion for new trial, to

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> That Petitioner does not intend to waive any claim or right herein. In fact, Petitioner has expressly advised counsel that he declines to waive any claim raised in his 27.26 motion filed herein or any claim which could be discovered and raised herein if counsel were allowed to conduct full and adequate discovery and investigation and adequately prepare for a hearing herein.

JA 113-14. The trial court threatened Mr. Kempton with jail if he did not go forward that day. It was later learned that it did this as a result of an *ex parte* telephone call from the Chief Justice of the Missouri Supreme Court, William Billings, insisting that the case be moved along. JA 39, 41.

[9] Howard attributed his inaction to fear of retaliation from Justice Billings. JA 44. Like all of Schlup's lawyers, Howard has confirmed that "Throughout my representation of Lloyd Schlup, he has consistently maintained his innocence. He persisted in attempting to focus counsel's efforts on the guilt phase of his trial." JA 44-45.

brief them on appeal, or to pursue them in [his] postconviction proceedings." *Schlup v. Armontrout*, No. 89-0020C(3), slip op. at 6 (E.D. Mo. May 31, 1989). See JA 162-64.

On appeal from that ruling, the Eighth Circuit did not rely on procedural bar; it affirmed the dismissal of the petition because it found that the record before it did not support the ineffectiveness claim. *Schlup v. Armontrout*, 941 F.2d 1062 (8th Cir. 1991), *cert. denied*, 112 U.S. 1273 (1992). Although the court had not seen the most persuasive evidence of Lloyd Schlup's innocence, a dissenting member of the panel commented that "[t]his was a close case" because "[t]here was conflicting evidence of Schlup's guilt and he presented a plausible alibi defense." JA 116.

3. The Second Federal Habeas Proceedings.

After *certiorari* was denied from the first habeas appeal, the case was taken over by Petitioner's present counsel from the Missouri Capital Resource Center. Through those counsel, Lloyd Schlup was able, for the first time, to gather and present the evidence of his innocence. JA 163.

That evidence was presented first to the Missouri Supreme Court, in a petition for writ of habeas corpus which was rejected summarily. JA 54-55. It was then submitted to the United States District Court, in the successive habeas petition filed below, and numerous supporting documents. JA 4-16, 26-53, 54-56, 90-129. The petition was dismissed without an evidentiary hearing (JA 87) – and without specific findings on many of its most significant allegations and affidavits. *See* JA 91, 130.

a. Petitioner's Submission.

The submission below included both direct and circumstantial evidence – none of which was presented to Lloyd Schlup's jury – which showed that Schlup was not and could not have been involved in the murder of Arthur Dade, and which undercut the credibility of the two eyewitnesses who claimed he was.

The circumstantial evidence consisted of witnesses whose testimony, combined with the videotape, proves conclusively that Schlup could not have been involved in Dade's murder.

i. Lt. Robert Faherty.

One of those witnesses was a corrections officer the prosecution had called at trial, Lieutenant (later Captain) Robert Faherty. At trial, Lt. Faherty testified that he encountered Schlup at "T-3," a secure doorway at the end of a long corridor between the housing unit and the dining room. Tr. 301. He said Schlup was the first inmate to come down the hall. Tr. 316. Faherty testified he had admonished Schlup for shouting out a window at some other inmates. Tr. 303-05. He was asked how long he had been at his post before his encounter with Schlup (Tr. 303) and how long he remained there after (Tr. 307) – but, inexplicably, he was never asked how long Schlup was in his presence.

In an affidavit submitted to the Court of Appeals below,[10] Lt. Faherty provided this additional, crucial information. Faherty says in his affidavit that, soon after he arrived at T-3, he saw Schlup walking leisurely down the corridor with his hands in his pockets – the first prisoner to leave the housing unit. JA 157. When Faherty patted Schlup down, Faherty swears, Schlup was not perspiring or breathing hard. JA 157. Most importantly, Faherty estimates it took Schlup two and a half to three minutes to walk the almost 300-foot long corridor, loiter at the window, submit to the pat-down, and leave Faherty's line of sight. JA 157-8.[11] Combining this with an

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[10] Faherty came forward after seeing a news story about Schlup's impending execution. Although it was not before the District Court, the Court of Appeals considered his affidavit. JA 152 n.4; *see also* JA 139-42, 157-58.

[11] The panel majority below suggested that Lt. Faherty's affidavit was inconsistent with his trial testimony and therefore should not be considered without adequate explanation of that inconsistency. JA 142.

estimated thirty seconds required to get from the housing unit to the corridor, the time required to travel from T-3 to the dining room, and the time Schlup was in the dining room before the radio call, Lt. Faherty's affidavit estimates Schlup was out of the housing unit for five to five and a half minutes before the radio call was made (JA 158)[12] – far too long for Schlup to have been involved in Dade's stabbing, under any scenario.

ii. Inmate Clerk John Green.

John Green was the clerk for Housing Unit 5A on the day of the murder. A few days afterward, Green was questioned by state investigators. He told them that when the fight broke out, Sgt. Flowers told him to call base and he complied, using the telephone in the housing unit office. JA 33. However, Green was not interviewed by the defense or called as a witness at trial – making it possible for the prosecution to support its theory that the call must have been made by Capt. Eberle because he was the first officer into the Unit with a radio. JA 100.

Green was never contacted by anyone acting on behalf of Lloyd Schlup until September, 1993, when Schlup's new counsel found him living on a farm in Kansas. JA 119.[13] JA 123. Although he was long out of prison and no friend of Lloyd Schlup, Green signed an affidavit which was submitted

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However, examination of the trial record will show that Lt. Faherty simply was not asked these obvious questions; and that fact is explained by the very constitutional deficiencies claimed here. JA 157, 167.

[12] Judge Heaney's dissent finds this estimate "somewhat inconsistent" with other parts of Lt. Faherty's testimony. JA 158 n.7. The perceived inconsistency may be explained by the fact, which is not spelled out in Lt. Faherty's affidavit, that there is a 40 foot hallway, two flights of stairs, and another 60 foot hallway, between T-3 and the dining room. Tr. 383. Lt. Faherty's affidavit apparently estimates – quite conservatively, we submit – that it took Schlup 1/2 minute to traverse this last distance.

[13] Green had been released from prison in 1986 and never returned. JA 123.

to the District Court in support of a motion for reconsideration. JA 121-29. Among other things, Green's affidavit stated that he made the distress call "within seconds" of Dade hitting the ground. It could not have been more than a half a minute or a minute. . . . " JA 123. Green's testimony thus makes it impossible, under any view of the evidence, for Schlup to have participated in Dade's murder: for thirty seconds to a minute before the distress call, the videotape plainly shows Lloyd Schlup in the prison dining room, quietly getting his lunch. JA 158-59.

Green's affidavit also indicates that he saw the murder, and he has identified Randy "Rocky" Jordan as "the man who held Arthur Dade while Robert O'Neal stabbed him." JA 122, 126. He also viewed a picture of Lloyd Schlup and swore that he "did not see him anywhere around when Dade was stabbed." JA 128.[14]

iii. The Inmate Eyewitnesses.

In this last aspect of his testimony, John Green joins over a dozen other inmates who saw the crime – every one of whom clears Lloyd Schlup of any involvement in it. JA 5, 8, 10. Although there are inmates who implicate O'Neal, Stewart and/or Jordan, every inmate who was present and has described what he saw has sworn Schlup did not participate in the crime and was not at the scene.

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[14] The panel majority was skeptical of Green's testimony because at Stewart's trial Green denied he saw the stabbing. JA 140. Judge Heaney's dissent commented, "While this inconsistency would need to be explored on remand, I believe it is fairly easily explained. Green was at that time still in prison and justifiably afraid for his well-being. It was probably in his interest to say that he had arrived just after the stabbing as he then indicated. Now that he has been out of prison for seven years, he no longer is afraid to let the truth be known." JA 148. Green confirms that: "I knew that Jordan and O'Neal were in the Aryan Brotherhood, and if I said I saw them do it, they could easily have me killed." JA 123.

This includes not only Randy O'Neal and Rodney Stewart[15] – the two admitted participants in the stabbing – but also numerous inmates (and former inmates like Green) who have no reason to lie for Lloyd Schlup. Some of these witnesses were African Americans unlikely to help out a white man charged with Dade's allegedly race-motivated murder.[16] JA 94-95. A few of them did not see the killing but were behind Schlup on their way to the dining room when they heard the fight; they place Schlup outside the unit when the fight started; and several of them say that, within seconds after hearing the commotion, they had to step aside for the guards running from the dining room. JA 63. Eighteen others were eyewitnesses to the killing who swear that Schlup was not involved. JA 8-11, 62-63, 121-24.

iv. The Impeachment of the Prosecution Witnesses.

In addition to all this, the evidence proffered below undermined the credibility of the only two witnesses against Lloyd Schlup, Roger Flowers and John Maylee. Both of those witnesses were portrayed at trial as consistent and reliable.[17] Petitioner's evidence shows they were neither.

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[15] Stewart also has implicated Jordan. JA 96. Most of the other inmates are afraid to name names. JA 30-31, 93-94, 150. However, since the District Court proceedings, four more have given statements to counsel identifying Jordan as the third man.

[16] Dade's assailants were alleged to be members of a white supremacist group in the prison. JA 95. As one inmate eyewitness said, "I have no reason to lie for a white guy. . . . I know for certain that Lloyd Schlup did not kill Arthur Dade, and that he was not even present when Dade was killed." JA 150.

[17] "[I]t's not just one guard. You have Sergeant Flowers watching it, and upon the eighth walk you have another guard who sees it." Tr. 486. "What it comes down to, folks, is you've got two of the three guards that are responsible for the safety of the inmates who see the stabbing take place. There is absolutely no showing that these guards have any motive to lie, that they have any grudge against Mr. Schlup." Tr. 508-09.

Both Flowers and Maylee had given testimony before Schlup's trial which contradicts key parts of what they said at trial. For example, Flowers original statement said that *both* perpetrators fled in the opposite direction from the dining room (JA 12) – another fact which, together with the videotape, was sufficient to eliminate Schlup.[18] Flowers also twice testified before Schlup's trial that Dade was loaded on the stretcher and carried out of the housing unit *before* he took Stewart downstairs and encountered Eberle.[19] Since the videotape shows that Dade was carried out of the housing unit more than half a minute *after* the guards responded to the radio call, this would mean that the call could not have come from Eberle.

Officer Maylee's various statements and testimony are similarly fraught with contradiction. Maylee's claim that he saw the fight from four floors up itself was implausible;[20] and each time he made a statement his description of what he saw changed somewhat. His deposition testimony used at Schlup's trial said that he saw Schlup, O'Neal and Stewart running against the flow of inmate traffic before Dade was stabbed; but the inter-office communication (IOC) he wrote on the day of the offense says, when he first looked, the fight was already in progress. Ex. 31. He has given at least three

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[18] Consistent with this, Flowers has recently signed an affidavit that, based on what he saw, Schlup could not possibly have been the first inmate in line in the dining room.

[19] Q. Was Dade moved before you took Stewart out?
A. Yeah

* * *

Q. So Dade is on the stretcher and being taken out.
And then you took Stewart out?
A. Took him down to base.
Deposition of Roger Flowers, July 10, 1984, pp. 22-23.

[20] Because Maylee's deposition was used in lieu of his live testimony, he was not subject to cross examination. However, trial counsel established through another of State's witnesses, Officer Dan Bower, that Maylee's ability to view the scene from the top floor of the cell block was questionable, at least. Tr. 193-205.

different versions of what he saw and where he was when he saw it, and what the various participants did during and after the assault. See JA 12-13. The only thing consistent about his story is that he did not see Sgt. Flowers. TR 338-39. But because counsel permitted his deposition to be used, none of this was brought out in cross examination.

In addition to that, there was reason to doubt these witnesses beyond their inconsistency. The testimony of Officer Maylee, John Green and several other inmate witnesses shows Flowers was away from his post when Dade was killed. JA 122. That gives him a clear motive to claim he saw the stabbing when he did not. There was an even simpler reason to doubt John Maylee's credibility: Maylee, it turns out, was a three time convicted felon – a fact Schlup's counsel learned, despite a pretrial request for all witnesses' criminal records, only during course of the appeal below. JA 171.

b. The Second Federal Habeas Proceedings.

The petition filed in District Court outlined the evidence Schlup's new counsel had by then uncovered. It named fifteen witnesses who could clear Schlup, who were unknown to Schlup or his trial counsel. JA 8-10. It alleged that seven of those had given exculpatory statements or testimony which were not disclosed to defense counsel. JA 9, 14-15, 48. It appended affidavits and transcripts supporting all of these allegations.

The District Court issued an order to show cause, to which the Respondent answered that the claims were procedurally barred, and the affidavits were vague or inconsistent with the witnesses' prior statements. JA 17-25. To support these latter arguments, the Respondent submitted an extensive set of statements given by the witnesses to prison investigators, shortly after the offense, in which some of the witnesses told the investigators they did not see the stabbing. JA 17. Petitioner filed a traverse in which he pointed out that

some of the statements submitted by the Respondent supported Schlup's case,[21] and that the inmate witnesses who were silent were fearful of being "pressured by prison officials to 'snitch' against the people who committed the murder," because the murder "was rumored to be a 'hit' of an African-American inmate (Dade) by members of the Aryan Brotherhood, a white supremacist prison gang." JA 30-31. The traverse renewed Petitioner's request to determine the credibility of these witnesses in an evidentiary hearing. JA 32-33. It also argued that there was cause for Schlup's inability to previously present this evidence, in the failure of the prosecution to disclose much of it, and the refusal of his court-appointed postconviction counsel to honor his repeated requests that they investigate his case. JA 38-53.

Although Petitioner's counsel asked to meet with the court for a status conference or argument (JA 57), no hearing of any kind was ever held. Over the ensuing months, however, counsel continued his investigation and moved to expand the record with statements of additional witnesses who had recently been located, or who were first identified in the Respondent's Exhibit T. JA 54-57, 62-64. These witnesses "either . . . saw the stabbing and [state] Mr. Schlup was not involved, or that he saw prison guards running from the direction of the dining room toward the cellblock and simultaneously heard the noise caused by the fight during which Dade was . . . stabbed." JA 63. Counsel informed the court that his investigation was continuing, and he expected to submit additional evidence to the Court as it became available. *Ibid.* Respondent objected to the motion to expand the record on procedural grounds. JA 65-67.

Without hearing argument, the District Court rejected all of Petitioner's claims, and denied his motions for an evidentiary hearing and expansion of the record. JA 87. It found no cause for the alleged procedural defaults, and no showing of a

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[21] For example, one inmate told the investigators directly "they ain't got this guy right here." JA 30 n.5. Another inmate, incredibly, was not asked what he saw, even after he admitted he saw it. JA 31.

fundamental miscarriage of justice under the standard of *Sawyer v. Whitley*, 112 S.Ct. 2514 (1992). JA 71-75. The court viewed Petitioner's evidence with skepticism, criticizing the witnesses for not coming forward earlier and noting that inmates "do not necessarily have a strong incentive to refrain from perjuring themselves." JA 79. It discussed some of the specific statements, and found none which were conclusive, or alone sufficient to prevent a conviction. JA 81-86. However, it conceded that,

> [t]he affidavits presented by Petitioner do not suffer from all the same infirmities that caused the Supreme Court to discredit the affidavits submitted by Herrera. The instant case is . . . distinguishable from *Herrera* in that Herrera was convicted on the basis of a larger quantity of evidence than was presented at Petitioner's trial.

JA 79.

> Certainly these affidavits constitute probative evidence that may or may not have swayed the jury had they been presented at trial. However, in view of the countervailing evidence that was presented, the Court cannot say that even upon consideration of all the materials currently in the record no reasonable juror would have voted to convict Lloyd Schlup of the murder of Arthur Dade.

JA 86.

Petitioner's counsel moved for rehearing, pointing out that the court had not addressed a number of the most important items of new evidence, and arguing that the case should not be evaluated under the death sentencing standard of *Sawyer v. Whitley*, 112 S.Ct. 2514 (1992) JA 91-108. A few days later, he submitted the affidavit of John Green, who had only recently been located in rural Kansas. JA 119. Counsel renewed his request for a hearing on this evidence. JA 117, 120-121. The District Court denied the motion without comment. JA 130.

The Court of Appeals panel denied a stay[22] and affirmed by a divided vote. JA 131-172. In upholding the procedural bar, the panel adopted by reference the District Court's decision that there was no "cause" for the failure to previously present the new evidence of innocence, despite the fact that Schlup had repeatedly asked his appointed lawyers to do so. JA 72-73, 133. The panel majority also found no "miscarriage of justice," applying the standard of *Sawyer v. Whitley*, 112 S.Ct. 2514 (1992), which it functionally equated with the sufficiency of the evidence rule of *Jackson v. Virginia*, 443 U.S. 307 (1979):

> Witnesses' credibility . . . is an issue reserved for the trial jury. It is not a matter within the province of the district court or of this court in a habeas proceeding.

JA 137.

Senior Judge Heaney dissented from the panel opinion. Reviewing at length the evidence of Schlup's innocence (JA 156-160, 168-70), he concluded that it both showed a "miscarriage of justice" under *Sawyer*, and a "truly persuasive" case of actual innocence under *Herrera v. Collins*, 113 S.Ct. 853 (1993). JA 166. Three dissenters from the denial of rehearing en banc agreed. "[T]here is at least a substantial likelihood that a trier of fact would consider Schlup's evidence sufficiently persuasive to meet the high *Herrera* standard if an evidentiary hearing were held." JA 174 (Arnold, C.J.).

On November 18, 1993 – the day after the Court of Appeals denied rehearing *en banc*, and the day before Lloyd Schlup's scheduled execution – the Governor of Missouri granted a stay and ordered a special panel assembled to evaluate the evidence of Schlup's innocence, and make recommendations regarding the exercise of his clemency

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[22] Apparently in response to a news report of the panel's denial of the stay, Lt. Faherty came forward with his new information. Exhibit B-2. His affidavit was considered by the Court of Appeals as a supplement to the record. JA 141, 157.

power.[23] That process is continuing.[24] On February 14, 1994, Mr. Schlup filed his petition for writ of certiorari in this Court; on March 28, 1994, certiorari was granted.

SUMMARY OF ARGUMENT

1. The Court of Appeals erred in holding that Petitioner Schlup's claim that his conviction was a miscarriage of justice – a "prototypical" claim that "the State has convicted the wrong person of the crime" – was governed by the standard of *Sawyer v. Whitley*, rather than *Kuhlmann v. Wilson*. *Sawyer* did not overrule *Kuhlmann*, but specifically endorsed it. The reasons for *Sawyer*'s exception to *Kuhlmann*'s rule do not apply when a petitioner claims, not that he is "innocent of death," but that he is "actually innocent" of the crime, "the wrong person." Plausible claims of such completely wrongful convictions are rare. The difference between a person who committed a crime and one who did not is "easy to grasp," and does not involve the "myriad of considerations" which characterize the death sentencing decisions at issue in *Sawyer*. The historic concern of this Court with innocence, the "ultimate equity on the prisoner's side," cannot be squared with a standard that requires "clear and convincing evidence" to the point that "no reasonable juror would" disagree, before

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[23] The order from the Governor staying Mr. Schlup's execution came shortly after a polygraph test was administered to John Green by Don Dunlap, a retired police officer who had served more than 15 years as Chief Polygraphist in the Kansas City, Missouri, Police Department. No deception was indicated when Green said that he saw the crime, that Schlup was not involved, and that he called base as soon as Officer Flowers told him to do so.

[24] Schlup's counsel requested and obtained an order from the gubernatorial board of inquiry granting discovery which had been denied by the District Court. This discovery, and counsel's ongoing investigation, has led consistently to more witnesses and evidence of Schlup's innocence. *See* notes 15, 18, 22, 23 above. This newly-discovered evidence will be submitted to the District Court, in a motion to vacate judgment under Fed. R. Civ. Pro. 60(b).

the courts will even hear a claim like Lloyd Schlup's: that he is both wholly innocent and unfairly convicted.

2. The Court of Appeals went even beyond *Sawyer*, to establish a "miscarriage of justice" standard equivalent to the insufficiency of the evidence rule of *Jackson v. Virginia*. Neither *Sawyer*'s language nor its logic justify that. The Court in *Sawyer* carefully refrained from adopting *Jackson*'s language; it spoke repeatedly and deliberately of what a reasonable juror "would" find, not what one "could" find if all doubts are resolved in favor of the verdict. *Jackson*'s standard was fashioned in a wholly different context: the sufficiency of the evidence at an otherwise constitutional trial. The miscarriage of justice standard, by its nature, governs claims of constitutional error. The Court's miscarriage of justice decisions require consideration of all evidence, whether constitutionally tainted or not; and *Jackson* requires that all inferences and credibility assumptions be made in favor of the verdict. To combine those disparate standards is effectively to hold that no habeas petitioner can ever show a miscarriage of justice from any constitutional violation, however egregious, other than a violation of the rule of *Jackson* itself.

3. Petitioner Schlup's showing of innocence is as strong as any that can realistically be conceived, short of a plain *Jackson* violation. It includes a videotape and the testimony of a corrections lieutenant which places Schlup far from the scene of the crime. It includes eighteen witnesses, with no apparent motive to lie to assist Schlup, who swear he was not involved. It includes the identification of the perpetrator who was involved and was misidentified as Schlup. And it explains the error, by demonstrating a lack of credibility of both of the witnesses on whom Schlup's conviction rests.

Concededly, even this case does not meet the *Jackson v. Virginia* standard the Court of Appeals applied. Nor would it meet that standard if Schlup's witnesses were all above reproach, of if there were a hundred of them instead of a dozen, or even if the witnesses who had testified against him recanted. So long as evidence exists which a juror "could" credit, and convict, relief could not be granted – in this case,

or any of the "prototypical" cases of wrongful conviction that have shaped our modern legal history.

Lloyd Schlup has shown, as clearly and convincingly as can realistically be expected, that no reasonable juror would find him guilty beyond a reasonable doubt on the evidence that has now been uncovered. He has made a showing that he is probably innocent, by evidence which is far more than colorable. He certainly has established a fair probability that a juror would have a reasonable doubt. Under any standard faithful to the requirement that habeas petitions be disposed of as justice requires, his evidence should not have been rejected by the courts below without a hearing.

I. THE COURT OF APPEALS ERRED IN ASSESSING PETITIONER'S CLAIM OF "MISCARRIAGE OF JUSTICE" UNDER A STANDARD EXTRAPOLATED FROM *SAWYER v. WHITLEY*.

The principal issue on which the judges of the Court of Appeals divided was whether Petitioner's "miscarriage of justice" claim is governed by *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), or *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992).

The panel majority applied a standard drawn from *Sawyer*'s test of "actual innocence of the death penalty" to reject Lloyd Schlup's evidence that his murder conviction and death sentence were a classic case of fatal misidentification,[25] the result of defense counsel's failure to make reasonable investigations, *Strickland v. Washington*, 466 U.S. 668, 691 (1984), and the prosecution's failure to disclose known exculpatory evidence, *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Bagley*, 473 U.S. 667 (1985). Acknowledging that "appellant argue[d], with some justification, that *Sawyer* announced only a test for analyzing the fairness of the death penalty portion of a trial" and not "the guilt or innocence

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[25] *See, e.g.*, Edwin M. Borchard, Convicting the Innocent (1932); Herbert B. Ehrmann, The Case That Will Not Die: Commonwealth v. Sacco and Vanzetti (1969); Jerome & Barbara Frank, Not Guilty (1957); Erle Stanley Gardner, The Court of Last Resort (1952).

phase of the trial" (JA 134), the panel majority felt itself bound by Eighth Circuit precedent holding that *Sawyer* " 'applies equally to challenges to a conviction, not just challenges to a death sentence.' " JA 135, quoting *McCoy v. Lockhart*, 969 F.2d 649, 651 (8th Cir. 1992).

The dissenting member of the panel interpreted the reasoning and wording of *Sawyer* as establishing, quite clearly, that the Court had formulated a standard specifically for the sentencing stage of a capital case, while leaving unaltered *Kuhlmann*'s test of claims of "miscarriage of justice" at the guilt-innocence stage. JA 166 (Heaney, J.). Chief Judge Arnold and two other judges dissenting from the Eighth Circuit's denial of rehearing *en banc* in this case similarly concluded that *Sawyer* was concerned "only with the question of punishment, not that of guilt or innocence." JA 173.

Circuits other than the Eighth Circuit have interpreted *Sawyer* in the same manner as the dissenting judges below, treating *Kuhlmann* as the standard applicable to claims of "miscarriage of justice" at the guilt-innocence stage. *See, e.g., Campbell v. Blodgett*, 997 F.2d 512, 524 (9th Cir. 1992), *cert. denied*, 114 S. Ct. 1337 (1994); *Montoya v. Collins*, 988 F.2d 11, 13 (5th Cir.), *cert. denied*, 113 S. Ct. 1630 (1993). We submit that is, and should remain, the law.

A. The Assessment of "Actual Innocence" of a Crime Is, and Should Continue to Be, Governed by *Kuhlmann v. Wilson*.

To understand the precise nature of *Kuhlmann*'s and *Sawyer*'s respective roles in defining the "miscarriage of justice" doctrine, it is useful to review the emergence of the doctrine and its progressive refinement in the decisions of this Court.

When the Court first adopted the "cause and prejudice" rule for procedural defaults in *Wainwright v. Sykes*, 433 U.S. 72 (1977), it recognized the need to ensure that this rule

> will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice.

Id. at 91. However, because there was no need to define the standard further to resolve the *Sykes* case itself, the Court deferred the task of giving "precise content . . . [to these] terms . . . [to] later cases." 433 U.S. at 91.

Similarly, in *Engle v. Isaac*, 456 U.S. 107 (1982), the Court recognized that "[i]n appropriate cases those principles [of "cause" and "prejudice"] must yield to the imperative of correcting a fundamentally unjust incarceration," but left to another day the definition of the nature and contours of the "miscarriage of justice" exception. *Id.* at 135.

In *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), a plurality of the Court for the first time gave content to the "miscarriage of justice" doctrine. In doing so, it drew heavily upon Judge Henry J. Friendly's classic article, *Is Innocence Irrelevant?, Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970). The plurality stated that the prohibition against same-claim successive petitions for a writ of habeas corpus must give way when

> the prisoner supplements his constitutional claim with a colorable showing of factual innocence. This standard was proposed by Judge Friendly more than a decade ago as a prerequisite for federal habeas review generally. Friendly, *supra*. As Judge Friendly persuasively argued then, a requirement that the prisoner come forward with a colorable showing of innocence identifies those habeas petitioners who are justified in again seeking relief from their incarceration.

477 U.S. at 454 (opinion of Justice Powell, joined on this point by Chief Justice Burger, then-Justice Rehnquist, and Justice O'Connor). The plurality limited its conception of the "miscarriage of justice" exception to cases in which a petitioner can make a "colorable showing of factual innocence." *Ibid.* The dissenting Justices would have defined the

"miscarriage of justice" exception more broadly. *Id.* at 461-71 (Justice Brennan, joined by Justice Marshall); *id.* at 476-77 (dissenting opinion of Justice Stevens).

In defining the showing a habeas corpus petitioner must make to invoke the "miscarriage of justice" exception, the *Kuhlmann* plurality once again relied on Judge Friendly's analysis:

> As Judge Friendly explained, a prisoner does not make a colorable showing of innocence "by showing that he might not, or even would not, have been convicted in the absence of evidence claimed to have been unconstitutionally obtained." Friendly, *supra*, at 160. Rather, the prisoner must "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt." *Ibid.* (footnote omitted).

Kuhlmann, 477 U.S. at 454-55 n.17. As this passage from *Kuhlmann* demonstrates, Judge Friendly's formulation was selected in lieu of less exacting standards as a means of ensuring that "successive federal habeas review . . . [would] be granted only in [those] rare cases . . . [in which] the ends of justice so require." *Id.* at 454. Yet, at the same time, the plurality, like Judge Friendly, refrained from imposing upon the petitioner a burden of proof higher than "a fair probability." This ensured an adequate " 'safety valve,' " *Harris v. Reed*, 489 U.S. 255, 271 (1989) (Justice O'Connor, concurring), for identifying those cases in which "a constitutional violation has probably resulted in the conviction of one who is actually innocent," *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

Although the *Kuhlmann* decision addressed only the context of same-claim successive petitions, other decisions extended *Kuhlmann*'s "miscarriage of justice" analysis to the adequate and independent state procedural grounds doctrine

(*Murray v. Carrier*, 477 U.S. at 496; *Smith v. Murray*, 477 U.S. 527, 537 (1986)) and the abuse-of-the-writ doctrine for new-claim successive petitions (*McCleskey v. Zant*, 499 U.S. 467, 493 (1991)). In each of these contexts, the Court held that "principles of comity and finality . . . 'must yield to the imperative of correcting a fundamentally unjust incarceration.' " *Murray v. Carrier*, 477 U.S. at 495, quoting *Engle v. Isaac*, 456 U.S. at 135.

Each of the foregoing cases called for the application of the "miscarriage of justice" doctrine to the guilt-innocence stage of a trial. *See Sawyer v. Whitley*, 112 S. Ct. at 2517-19 (reviewing the evolution of the "actual innocence" exception for "successive, abusive, or defaulted federal habeas claim[s]"). In such a context, the concept of "miscarriage of justice" is easy to grasp, for the courts can draw upon the "prototypical example of . . . the case where the State has convicted the wrong person of the crime," *Sawyer v. Whitley*, 112 S. Ct. at 2519, the classic situation of "criminal prosecutions and convictions of completely innocent people." Borchard, *supra* at 367. Though rare, such "[g]rave injustices, as a matter of fact, do arise even under the most civilized systems of law" because "[a]ll systems of law . . . are administered through men [and women], and therefore may occasionally disclose the frailties of men [and women]." Felix Frankfurter, The Case of Sacco and Vanzetti 108 (1927). Those are the kinds of cases Justice Frankfurter had in mind when he wrote, "[p]erfection may not be demanded of law, but the capacity to correct errors of inevitable frailty is the mark of a civilized legal mechanism." *Ibid.*

In *Smith v. Murray*, 447 U.S. 423 (1986), and again in *Adams v. Dugger*, 489 U.S. 401 (1989), the Court considered the applicability of the "miscarriage of justice" exception to claims relating to the sentencing stage of a capital trial. While accepting that a habeas corpus petitioner who has been sentenced to death must be permitted to invoke a "miscarriage of justice" exception in appropriate cases, the Court observed that the test formulated in *Kuhlmann* "does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense." *Smith*, 477 U.S. at 537.

Accord, Adams, 489 U.S. at 412 n.6. Because neither of these cases required a resolution of the issue, the Court expressly refrained from "undertak[ing] . . . to define what it means to be 'actually innocent' of a death sentence." *Adams*, 489 U.S. at 412 n.6.

In the wake of *Smith* and *Adams*, the lower courts developed widely disparate formulations for adapting the "actual innocence" test to the sentencing stage of a capital trial.[26] It was against this backdrop that the Court handed down *Sawyer v. Whitley*. An examination of the *Sawyer* opinion demonstrates that the Court's attention was directed solely to the task at hand – that of defining the concept of "actual innocence" of a death sentence – and that the Court neither explicitly nor implicitly re-examined the validity of *Kuhlmann*'s formulation of "actual innocence" of a crime. The Court began its opinion in *Sawyer* by explaining that:

> The issue before the Court is the standard for determining whether a petitioner bringing a successive, abusive, or defaulted federal habeas claim has shown he is "actually innocent" of the death penalty to which he has been sentenced so that the court may reach the merits of the claim.

112 S. Ct. at 2517. Noting that "the concept of 'actual innocence' is easy to grasp" as it applies to "noncapital case[s]" (*id.* at 2520), the Court reiterated that that context is governed by the standard that *Kuhlmann* derived from Judge Friendly's article. *See id.* at 2519 & n.5 (approvingly quoting *Kuhlmann*). The Court then turned to the "more difficult [task] . . . [of] develop[ing] an analogous framework" for defining the concept of " 'innocent of death.' " *Id.* at 2520.

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[26] *See, e.g., Deutscher v. Whitley*, 946 F.2d 1443, 1444-46 (9th Cir. 1991), *vacated and remanded for reconsideration in light of Sawyer v. Whitley*, 113 S. Ct. 367 (1992); *Sawyer v. Whitley*, 945 F.2d 812, 820 (5th Cir. 1991), *aff'd*, 112 S. Ct. 2514 (1992); *Johnson v. Singletary*, 938 F.2d 1166, 1183 (11th Cir. 1991) (*en banc*), *cert. denied*, 113 S. Ct. 361 (1992); *Johnson v. Dugger*, 911 F.2d 440, 468 (11th Cir.), *vacated*, 920 F.2d 721 (11th Cir. 1990); *Stokes v. Armontrout*, 893 F.2d 152, 156 (8th Cir. 1989).

The core of the "difficult[y]," as the Court explained in *Sawyer*, is that there is no conceptually obvious criterion for identifying when "the law has made a mistake" and produced a "miscarriage of justice" at the sentencing stage of a capital trial. 112 S. Ct. at 2520. At the guilt-innocence stage of a capital trial, as in noncapital cases, " 'actual innocence' " provides a "very narrow," "workable," and "relatively objective standard[];" it defines the test of when "the law has made a mistake" in terms of the "prototypical" question of whether "the State has convicted the wrong person of the crime." *Id.* at 2519-20. But a "fundamental difference between the nature of the guilt/innocence determination . . . and the nature of the life/death choice at the penalty phase" is that the penalty phase does not present a clear, focused " 'central issue' " like the question of whether the accused committed the crime; there is merely a "general concern that the penalty be tailored to the individual defendant and the offense," and the jury typically "is free to consider a myriad of factors to determine whether death is the appropriate punishment." *California v. Ramos*, 463 U.S. 992, 1007-09 (1983).[27] The Court was justifiably concerned that under a *Kuhlmann* standard of whether there is a "fair probability" that "the law has made a mistake" and has produced the wrong outcome, the vast majority of habeas corpus petitioners could invoke the "miscarriage of justice" exception by colorably claiming that some difference in the sentencing proceedings would have produced a different result.

Accordingly, the Court in *Sawyer* settled upon a formulation that would define "actual innocence of death" in terms of "eligibility to receive the death penalty" rather than "the ultimate discretionary decision between the death penalty and life imprisonment." *Sawyer*, 112 S. Ct. at 2521. Yet, as the Court recognized, even that limitation would not suffice to

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[27] *See also Satterwhite v. Texas*, 486 U.S. 249, 258 (1988) ("the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer").

ensure that "the inquiry . . . [would be the] 'narrow' exception to the principle of finality which we have previously described it to be." *Id.* at 2522. Since even eligibility for the death penalty may turn in many cases upon a highly discretionary jury judgment (such as whether " 'the offense was committed in an especially cruel, atrocious and heinous manner,' " *id.* at 2517 n.2)), some additional procedural mechanism was needed to make the inherently difficult assessment of "innocence of death" more "workable [and] . . . subject to determination by relatively objective standards." *Id.* at 2520. The Court therefore established a burden of proof higher than what it was willing to tolerate for claims of "actual innocence" at the guilt-innocence stage; it held that petitioners who wish to invoke the "miscarriage of justice" exception at the sentencing stage must

> show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.

Id. at 2517; *see also id.* at 2523, 2525.

The Eighth Circuit erred in ignoring this reasoning and construing *Sawyer* as establishing a standard for assessing "miscarriages of justice" at the guilt-innocence stage as well as at the sentencing stage of a capital trial. As the foregoing discussion has shown, the *Sawyer* opinion focused exclusively upon the standard to be applied to claims relating to the capital sentencing context, and formulated a standard that was directly responsive to the unique aspects of the capital sentencing decision. And, to the extent that the Court commented on the standard applicable to the guilt-innocence stage, it did so by reiterating and reaffirming *Kuhlmann* as the appropriate test of "actual innocence" of the crime. *See id.* at 2518-19.

There is no reason the Court should now overrule *Kuhlmann* and extend *Sawyer*'s standard to apply to all stages of a capital case. There is no indication that the lower courts have had difficulty applying *Kuhlmann's* standard or have done so in an overbroad manner. Nor would such a change in the law "advance[] uniformity in the law of habeas corpus."

Keeney v. Tamayo-Reyes, 112 S. Ct. 1715, 1720 (1992). Neither uniformity nor reason is advanced by treating genuinely different issues or contexts as though they were the same.

Kuhlmann itself differentiated guilt-innocence claims from sentencing arguments. The plurality stated:

> [A] prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated. That interest does not extend, however, to prisoners whose guilt is conceded or plain.

477 U.S. at 452.[28] This distinction between the two stages of a capital case reflects the Court's longstanding, particularized concern for guarding against the ultimate injustice of execution or incarceration of the innocent.[29]

Moreover, as demonstrated in the earlier discussion of *Kuhlmann* and *Sawyer*, the doctrinal differences between the two standards comport with the differing issues and interests arising at their respective stages of a capital case. *Kuhlmann* adopted a somewhat lower burden of proof to guard against the risk of incarcerating or executing a wholly innocent person; the Court could afford to do so because a standard that turns upon "actual innocence of the crime" is already so

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[28] *Accord, Herrera v. Collins*, 113 S. Ct. 853, 882 n.6 (1993) (Justice Blackmun, dissenting) (those who invoke *Kuhlmann* at the guilt-innocence stage "claim[] that [they are] . . . actually innocent of the capital crime," whereas *Sawyer* was "developed . . . for prisoners who are concededly guilty of capital crimes").

[29] *See, e.g., Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976) ("[r]esort to habeas corpus [is] especially . . . [appropriate] to assure that no innocent person suffers an unconstitutional loss of liberty"); *Schneckloth v. Bustamonte*, 412 U.S. 218, 256 (1973) (Justice Powell, concurring) ("Habeas corpus . . . *should* provide the added assurance for a free society that no innocent man suffers an unconstitutional loss of liberty."); *Kaufman v. United States*, 394 U.S. 217, 235-36 (1969) (Justice Black, dissenting) ("the defendant's guilt or innocence is at least one of the vital considerations in determining whether collateral relief should be available to a convicted defendant"). *See also* Friendly, *supra* at 164 ("considerations of finality should not keep a possibly innocent man in jail").

"narrow [an] exception." *Sawyer*, 112 S. Ct. at 2520. In contrast, the unfocused and inherently discretionary nature of the capital sentencing judgment required that the Court impose upon petitioners a higher burden of proof to ensure that the test of "miscarriages of justice" at the sentencing stage would be "a 'narrow' exception to the principle of finality." *Id.* at 2522.[30]

Given the historical lineage of the *Kuhlmann*-Friendly standard and its well-developed jurisprudential underpinnings, there is good reason to preserve it. As the Court has observed, modifications of habeas corpus law should promote "[c]onsiderations of certainty and stability in [the] discharge of the judicial function" by preserving standards already "[w]ell-defined in the case law . . . [and] familiar to federal courts." *McCleskey*, 499 U.S. at 496. The *Kuhlmann* standard is not only "well-defined . . . [and] familiar to federal courts" as a result of almost a decade of application, it is also a standard that is "easy to grasp" (cf. *Sawyer v. Whitley*, 112 S. Ct. at 2520), one that can be applied "with relative ease" (*id.* at 2522) and that is "rare[ly]" met (*id.* at 2519). Accordingly, the interests of "certainty and stability" (*McCleskey*, 499 U.S. at 496) – as well as those of truth and justice – weigh heavily in favor of preserving the doctrine in its present form.

B. *Kuhlmann*'s Standard Accommodates Interests and Concerns Not Addressed in *Sawyer v. Whitley*

As the preceding section demonstrated, the *Sawyer* standard was carefully framed to accommodate the unique aspects of the capital sentencing process and the respective interests

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[30] It is worth noting that when the Judicial Conference's *Ad Hoc* Committee on Federal Habeas Corpus in Capital Cases, chaired by the Honorable Lewis F. Powell, Jr., incorporated the "actual innocence" exception in its proposed legislation, the Committee limited that exception to claims of innocence of the crime, wholly excluding claims of innocence of the death penalty. *See* Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal 15, 17-18 (August 23, 1989).

of the petitioner and the State at that stage of the process. The test of "miscarriages of justice" at the guilt-innocence stage of a capital or noncapital trial should similarly accommodate the unique interests and concerns at stake in the rare case where the basic truthfinding mechanisms guaranteed by the Constitution are credibly alleged to have broken down, resulting in the conviction of the wrong person.

The *Sawyer* opinion's discussion of miscarriages of justice at the guilt-innocence stage is a useful place to begin identifying these interests and concerns. Chief Justice Rehnquist's majority opinion observes that the "prototypical example of 'actual innocence' in a colloquial sense is the case where the State has convicted the wrong person of the crime." *Sawyer*, 112 S. Ct. at 2519. The reason why this type of case serves as a "prototype" or paradigm for the judiciary's conception of a "miscarriage of justice" at the guilt-innocence stage is self-evident: our society has always been profoundly disturbed by the revelation that an innocent person has been wrongly imprisoned – or, worse, wrongly executed. *See, e.g.*, Borchard, *supra*; Frank & Frank, *supra*. The "fundamental miscarriage of justice exception, [which] is grounded in the 'equitable discretion' of habeas courts[,] [provides a mechanism] to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera v. Collins*, 113 S. Ct. at 862.

> [T]his Court continuously has recognized that the ultimate equity on the prisoner's side – a sufficient showing of actual innocence – is normally sufficient, standing alone, to outweigh other concerns and justify adjudication of the prisoner's constitutional claim.

Withrow v. Williams, 113 S. Ct. 1745, 1757 (1993) (opinion of Justice O'Connor). In Justice O'Connor's words, the exception serves as "a kind of 'safety valve' for the 'extraordinary case' " of the "factual[ly] innocen[t]" defendant. *Harris v. Reed*, 489 U.S. at 271 (concurring opinion).

In a case like this one, at least, *Kuhlmann* sets that "safety valve" at a sufficiently demanding level. At least

where a petitioner raises a claim like those here – constitutional violations impacting the reliability of the truthfinding process itself – a colorable showing of innocence should suffice. That is more than Judge Friendly's article would require. As the Court may recall, Judge Friendly's article not only advocated that habeas corpus be directed to correcting the injustice of convicting persons who were probably innocent; it also identified a second form of fundamental miscarriage of justice: "cases [in which] the criminal process itself has broken down," so the constitutional "attack [therefore] concerns the very basis of the criminal process." Friendly, *supra* at 151-52. "[I]n these [types of] cases," Judge Friendly maintained, "few would object to allowing collateral attack." *Id.* at 152. Judge Friendly thus viewed his two categories of miscarriages of justice – probable factual innocence and fundamental breakdown of the criminal process – as alternative bases for habeas corpus review of constitutional claims. *See id.* at 152. In a case like this one, where it is alleged that the constitutional truthfinding process has broken down repeatedly and in fundamental ways, *Kuhlmann*'s "miscarriages of justice" inquiry effectively combines Judge Friendly's categories.

Lloyd Schlup claims he has suffered a wrongful conviction *because of* a breakdown in the core safeguards of the criminal process that are designed precisely to assure against this result. Those safeguards are supposed to protect against "dubious and unjust convictions, with resulting forfeitures of life, liberty, and property.' " *In re Winship*, 397 U.S. 358, 362 (1970). Surely it must be a "miscarriage of justice" if it is true, as he has shown, that his conviction is *both* " 'dubious' " – in the sense that there exists a fair probability that the trier of fact would have harbored a reasonable doubt of his guilt if it had heard and considered all of the available evidence and its reliability, *Kuhlmann*, 477 U.S. at 455 n.17 – *and* " 'unjust' " – in the sense that the conviction resulted from a breakdown of the "very bas[e]s of the criminal process," Friendly, *supra* at 152, that ordinarily serve to guaranty against such convictions.

In this respect, also, Lloyd Schlup's case is a "prototypical example" (*Sawyer*, 112 S. Ct. at 2519) of our society's shared conception of injustice. The most infamous cases of injustice in this country are those in which an innocent person was "railroaded" as a result of police or prosecutorial prejudgment, incompetent or indifferent defense representation, local hostilities or biases, or all these things. Prime examples in our history and jurisprudence are the cases of the so-called "Scottsboro Boys"[31] and of Leo M. Frank.[32] *See generally* Michael L. Radelet, Hugo Adam Bedau & Constance E. Putnam, In Spite of Innocence: Erroneous Convictions in Capital Cases 116-118, 304 (1992).

The Scottsboro and Frank cases provide a useful illustration of the dangers of setting too high a standard for petitioners to satisfy in order to invoke the "miscarriage of justice" exception. To increase the petitioner's burden of proof to show guilt-innocence errors, by requiring the same level of "clear and convincing" proof that *Sawyer* demands at the sentencing stage, would make it unlikely that either the Scottsboro defendants or Frank would qualify as a "miscarriage." In the case of the Scottsboro defendants, "[t]he underlying facts of the case as they eventually emerged showed that the two women [complainants] had completely fabricated the story of rape;" but it took almost three decades of retrials, appeals, and clemency proceedings before the Scottsboro defendants were finally absolved of "a crime that never occurred." Radelet, Bedau & Putnam, *supra* at 118. For most of those three decades, they probably could not have satisfied

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[31] *See Norris v. Alabama*, 294 U.S. 587 (1935); *Powell v. Alabama*, 287 U.S. 45 (1932); *see also* James Goodman, Stories of Scottsboro (1994); Robert Leibowitz, The Defender: The Life and Career of Samuel S. Leibowitz 185-249 (1981).

[32] *See Frank v. Mangum*, 237 U.S. 309 (1915); *see also* Leonard Dinnerstein, The Leo Frank Case (2d ed. 1987); ROBERT SEITZ FREY & NANCY THOMPSON-FREY, THE SILENT AND THE DAMNED: THE MURDER OF MAY PHAGAN AND THE LYNCHING OF LEO FRANK (1988); Albert S. Lindemann, The Jew Accused: Three Anti-Semitic Affairs (Dreyfus, Beilis, Frank) 235-72 (1991).

a *Sawyer*-type standard of " 'clear and convincing evidence [that] no reasonable juror would find [them] [guilty].' " JA 135, quoting *Sawyer v. Whitley*, 112 S. Ct. at 2523. The Scottsboro cases certainly were ones in which the criminal process broke down, and they could have satisfied *Kuhlmann*'s standard of " 'a fair probability that, in light of all the evidence, . . . the trier of the facts would have entertained a reasonable doubt of . . . guilt.' " 477 U.S. at 454 n.17. Similarly, Leo Frank, whose "conviction had been obtained in an atmosphere of strong anti-Semitism on perjured testimony from Jim Conley, the person who probably was the real culprit" (Radelet, Bedau & Putnam, *supra* at 304), would have been denied relief under the exacting *Sawyer* standard – at least until 1982, when a critical witness came forward with unimpeachable exonerating evidence[33] – but Frank could have found refuge under *Kuhlmann*.

When this Court in *Wainwright v. Sykes* began the project of defining procedural restrictions upon the use of habeas corpus, it did not forget the historic lessons of these cases; it insisted that the one protection upon which innocent Americans could continue to depend was that the new rules would not close the doors of the federal courts to those "defendant[s] who in the absence of . . . [federal habeas corpus] adjudication will be the victim[s] of a miscarriage of justice." 433 U.S. at 91. *Kuhlmann* gave substance to that assurance, without jeopardizing the interests *Sykes* furthered. That assurance should not be withdrawn in this case.

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[33] *Ibid.*; *see also* Wendell Rawls, Jr., *After 69 Years of Silence, Lynching Victim Is Cleared*, N.Y. TIMES, March 8, 1982, at A12 (describing two Tennessee reporters' dogged investigation leading to the 1982 discovery of critical exculpatory evidence in the Leo Frank case).

II. THE COURT OF APPEALS ERRED IN CONSTRUING *SAWYER v. WHITLEY* TO ESTABLISH AN INSUFFICIENCY-OF-THE-EVIDENCE STANDARD EQUIVALENT TO THAT OF *JACKSON v. VIRGINIA*

In the event that this Court chooses to apply *Sawyer v. Whitley* to the guilt-innocence stage of a capital trial, and even to claims of complete factual innocence like Lloyd Schlup's, it will have to address the second issue presented by this case: whether the Court of Appeals erred in interpreting *Sawyer* as establishing an insufficiency-of-the-evidence standard equivalent to that of *Jackson v. Virginia*, 443 U.S. 307 (1979).

Although the Court of Appeals did not explicitly state that it was equating *Sawyer*'s standard with *Jackson*'s, the logic of its decision makes clear that it did so. Deeming dispositive the fact that there was eyewitness testimony supporting Schlup's conviction, the Court of Appeals refused to examine the credibility of that testimony or to weigh it against contrary evidence:

> At trial, as noted by the district court, two prison officials, who were eyewitnesses to the crime, positively identified Mr. Schlup as one of the three perpetrators of the murder. This evidence was clearly admissible and stands unrefuted except to the extent that Mr. Schlup now questions its credibility. Witnesses' credibility, however, is an issue reserved for the trial jury. It is not a matter within the province of the district court or of this court in a habeas proceeding. Federal habeas, as explained in *Herrera*, does not provide a forum for the retrial of a convicted felon. *Herrera v. Collins*, 113 S. Ct. 853, 860-61 (1993). So, even if we disregard the source of the new evidence, the eleventh-hour nature of the information, and a presentation coming almost six years after the trial; it is simply not possible to say that the appellant has shown by clear

and convincing evidence that but for a constitutional error no reasonable jury would have found him guilty.

JA 137-38 (emphasis added). Its affirmance of the District Court's refusal to permit discovery, expansion of the record, or an evidentiary hearing was necessarily premised on its belief that no amount of new evidence could make a difference.

The Court of Appeals majority thus equated *Sawyer*'s test with *Jackson*'s, which measures the sufficiency of evidence at trial to support a conviction and holds that proof of guilt is constitutionally insufficient only where there is no evidence from which a rational fact-finder "could" have found all elements beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *see Wright v. West*, 112 S. Ct. 2482, 2485-86 (1992). The dissenting judge below took a different approach, carefully evaluating the additional proffered evidence and concluding that a jury that heard all of the evidence might well be compelled to acquit Lloyd Schlup. JA 159-160, & n.8 (Heaney, J.) ("Had trial counsel presented the exculpatory eyewitnesses now presented, the jury would have received the full picture of Dade's murder, and if it were to credit the new evidence, it would have no choice but to acquit.")

The lower court majority's equation of *Sawyer* with *Jackson* overlooks the careful language this Court used in announcing its standard in *Sawyer*. This Court quite clearly stated that the question to be addressed is whether, in the absence of constitutional error, a "reasonable juror *would* find [the petitioner] eligible for the death penalty." *Sawyer*, 112 S. Ct. at 2523 (emphasis added). The Court's choice of language in *Sawyer* obviously was quite deliberate, for it settled upon this formulation only after giving consideration to both a "would" and a "could" formulation. As the Court related:

> The [Fifth Circuit] Court of Appeals in this case . . . adopted this test:
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> "[W]e must require the petitioner to show, based on the evidence proffered plus all record evidence, a fair probability that a rational trier of fact *would have entertained a reasonable doubt* as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty." 945 F.2d, at 820 (footnotes omitted).

* * *

The Eleventh Circuit articulated the following test:

> "Thus, a petitioner may make a colorable showing that he is actually innocent of the death penalty by presenting evidence that an alleged constitutional error implicates *all* of the aggravating factors found to be present by the sentencing body. That is, but for the alleged constitutional error, the sentencing body *could not* have found *any* aggravating factors and thus the petitioner was ineligible for the death penalty. In other words, the petitioner must show that absent the alleged constitutional error, the jury would have lacked the discretion to impose the death penalty; that is, that he is *ineligible* for the death penalty." *Johnson v. Singletary*, 938 F.2d 1166, 1183 (CA11 1991) (emphasis in original).

Sawyer, 112 S. Ct. at 2522-23 & n.15 (emphasis added to quotation from Fifth Circuit decision). Having examined these two alternatives, the Court adopted the standard employed in the Fifth Circuit:

> Therefore we must determine if petitioner has shown by clear and convincing evidence that but for constitutional error, no reasonable juror *would* find him eligible for the death penalty under Louisiana law.

Sawyer, 112 S. Ct. at 2523 (emphasis added). In at least five passages, the majority opinion in *Sawyer* refers to the standard being adopted as whether a reasonable juror "*would* find the defendant eligible for the death penalty." *See id.* at 2517, 2523-25 (emphasis added).

The distinction between "could" and "would" becomes even clearer if one considers the potential impact of a *Jackson* type standard on prototypical cases like those of the Scottsboro defendants and Leo Frank. We observed earlier that not for decades after those cases were tried would the evidence available to the defense have sufficed to meet the standard which the Eighth Circuit derived by transposing *Sawyer* to the guilt-innocence stage. This is so because most of the doubt-creating evidence in these cases, and certainly the most persuasive evidence of the defendants' innocence, emerged only in the wake of two generations of investigation and scholarly research. *See* pages 33-34 above.

But even now, with all we know about the cases in the fullness of history, the Scottsboro defendants and Leo Frank would not be able to satisfy a *Jackson*-type test of "miscarriage of justice." Notwithstanding the questionable aspects of the prosecution witnesses' testimony in the Scottsboro case, there was evidence of guilt the jury "*could*" have believed. *See* GOODMAN, *supra* at 13-14; LEIBOWITZ, *supra* at 206-23. Similarly, in Leo Frank's case, the jury "*could*" have believed the carefully coached lies of the actual murderer, Jim Conley. *See* DINNERSTEIN, *supra* at 40-47; FREY & THOMPSON-FREY, *supra*, at 37-40; LINDEMANN, *supra* at 254-56. Indeed, when Leo Frank was pardoned, posthumously, in 1986, the Georgia Court of Pardons stated that " 'it is impossible to decide conclusively the guilt or innocence of Leo M. Frank.' " LINDEMANN, *supra* at 235 n.2.

The Scottsboro and Frank cases also serve to illustrate the extent to which a *Jackson*-type standard would impede a reviewing court from giving due consideration to evidence of innocence proffered by the defense. If, as in these cases, a defendant elected to testify at trial but was nonetheless convicted, the Court of Appeals' standard would require that the reviewing court dismiss on the ground that the trier of fact "could" (and, indeed, did) find the testimony unworthy of belief. *Cf. Wright v. West*, *supra*. This conclusion would be compelled even if, as in the Scottsboro case, any contradictions in or apparent "incoheren[ce]" of a defendant's testimony (Goodman, *supra* at 14-15) can be attributed to

inadequate preparation on the part of defense counsel or an innocent person's fear of being wrongfully convicted. Indeed, the Court of Appeals' standard would require that a reviewing court disregard the account of a defendant who took the stand – even if, as in Leo Frank's case, the defendant's words " 'carried the ring of truth in every sentence.' "[34] While this Court's formulation of the standard in *Sawyer* permits a reviewing court to examine whether a reasonable trier of fact "would" have credited the defendant, the Court of Appeals' more restrictive test requires dismissal of the defendant's testimony simply because a trier of fact always "could" choose to disbelieve a witness.

Under the *Jackson*-type standard adopted by the Court of Appeals below, affirmative evidence of innocence *never* satisfies the "actual innocence" test because the record of conviction is invariably based upon other evidence that a jury *could* believe. Indeed, even if a petitioner came forward with incontrovertible evidence of innocence – such as, for example, "a videotape of the crime" (*Arizona v. Fulminante*, 111 S. Ct. 1246, 1266-67 (1991) (Kennedy, J., concurring)) or proof that "another person has credibly confessed to the crime" (*Sawyer*, 112 S. Ct. at 2519) – the habeas corpus court would still be bound to deny consideration of the petition if there is any prosecution evidence, no matter how weak or impeachable, that the jury *could* have believed.

Finally, a *Jackson* standard would eviscerate what is often the most important part of a showing of "actual innocence": the presentation of exculpatory witnesses who were not called at trial because the defense attorney failed to conduct an adequate investigation or was misled by the prosecution into thinking that no such witnesses existed. Exculpatory witnesses, no less than prosecution witnesses, may suffer from "the 'erosion of memory' . . . that occur[s] with the passage of time that invariably attends collateral attack." *Kuhlmann v. Wilson*, 477 U.S. at 453. And even without

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[34] Dinnerstein, *supra* at 51 (quoting a local newspaper, the *Atlanta Constitution*); *see also* FREY & THOMPSON-FREY, *supra* at 147-57.

memory lapses, a *Jackson* standard would appear to require that the reviewing court dismiss the witnesses' account in favor of any evidence which supports the verdict – even though the court is convinced that no reasonable trier of fact "would" refuse to credit the new, exculpatory evidence.

That this Court did not intend the application of such a restrictive standard is evident not only from its careful wording in *Sawyer*, but also from the past decisions which it chose to quote approvingly in *Sawyer*. In its explanation of the standard to be applied at the guilt-innocence stage, the Court quoted *Kuhlmann*'s explanation that:

> "[T]he prisoner must 'show a fair probability that, in light of *all* the evidence, including that alleged to have been illegally admitted (*but with due regard to any unreliability of it*) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.' "

Sawyer, 112 S. Ct. at 2519 n.5 (quoting *Kuhlmann*, 477 U.S. at 455 n.17, quoting Friendly, *supra* at 160) (emphasis added). *Jackson* admits no "regard" for "unreliability;" all inferences any reasonable person could draw, must be drawn in favor of the verdict.

The Court of Appeals' rigidly narrow approach is the very antithesis of the flexible, balanced standard envisioned by Judge Friendly and adopted by the Court in *Kuhlmann* and *Sawyer*. This Court in *Sawyer* also approvingly quoted Justice O'Connor's statement for the Court in *Smith v. Murray*, *supra*, that "the habeas petitioner . . . had failed to show actual innocence of the death penalty because the 'alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones.' " *Sawyer*, 112 S. Ct. at 2519, quoting *Smith*, 477 U.S. at 538. But the *Jackson* standard applied by the Court of Appeals below would prevent a reviewing court from considering whether the alleged constitutional error had "precluded the development of true facts," for any "true fact" "could" be disregarded or found incredible by a finder of fact.

Finally, it is important to recognize that in a case such as this – where ineffectiveness of counsel and the suppression of evidence prevented the jury from hearing critical testimony on the question of the defendant's commission of the crime – an incorporation of a *Jackson* standard into the *Sawyer* doctrine would frustrate the very principles that led to the Court's adoption of the *Jackson* standard as a test of constitutional sufficiency of the evidence. The *Jackson* standard was carefully designed to assure that reviewing courts would not impinge upon the fundamental role of the jury (or judicial fact-finder):

> This . . . standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.

Jackson, 443 U.S. at 319 (footnotes omitted) (emphasis in original). The *Jackson* decision naturally assumed a situation in which the jury or judicial fact-finder has actually heard "all of the evidence," since the issue before the Court was how a reviewing court should assess the constitutional sufficiency of the evidence presented at trial. The situation is necessarily very different when the jury has *not* heard critical evidence bearing on the petitioner's innocence. In such situations, *Jackson*-type deference to the jury's original credibility determinations is misguided, for the jury made its assessments without the benefit of critical evidence. *Cf. Sullivan v. Louisiana*, 113 S. Ct. 2078, 2081-82 (1993); *Carella v. California*, 491 U.S. 263, 269 (1989) (Justice Scalia, concurring). Indeed, application of a *Jackson* standard in such a situation actually turns *Jackson* on its head, for it serves to deprive the jury of

any meaningful function in the criminal process. It conclusively presumes that the jury "would" have reached the same conclusion as to the petitioner's guilt even after hearing the new evidence, simply because the jury "could" have chosen to continue to believe an item of the incomplete evidence presented at the original trial.

The standard actually adopted by the Court in *Sawyer* and *Kuhlmann* is far more consistent with "[t]he right to trial by jury . . . [and] [the underlying] 'profound judgment about the way in which law should be enforced and justice administered.' " *Sullivan*, 113 S. Ct. at 2083 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)). It asks the question whether " ' "the trier of the facts would have entertained a reasonable doubt of [the petitioner's] guilt" ' " if the jury or judicial fact-finder had heard and weighed

> " 'all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.' "

Sawyer, 112 S. Ct. at 2519 n.5 (quoting *Kuhlmann*, 477 U.S. at 455 n.17, quoting Friendly, *supra* at 160). That standard, not *Jackson*'s, is the one that should be applied to assess claims of "actual innocence" at the guilt-innocence stage of a capital trial. The Court of Appeals erred in holding otherwise.

III. UNDER ANY PROPER STANDARD, PETITIONER'S SHOWING ESTABLISHES "ACTUAL INNOCENCE" AND A "MISCARRIAGE OF JUSTICE".

As the dissenting judges below found, the case for Lloyd Schlup's innocence is so strong that it establishes, *prima facie*, a "miscarriage of justice" under any standard less demanding than the impossible one utilized by the panel majority below. The evidence that Mr. Schlup is innocent of this crime is more than extraordinary; it approaches a conclusive demonstration of innocence as closely as realistically can be conceived. Although Schlup's case is not celebrated, in

many ways the evidence of his innocence is stronger, even, than the evidence for the defendants in the historic cases discussed above.

Mr. Schlup's case begins, of course, with the videotape which shows him at the head of the line of inmates in the prison dining room, moving slowly through the line and quietly getting his meal – for a full minute before the call went out that a fight had broken out back in his living unit. To discount the incontrovertible evidence on the videotape, it is necessary to assume:

> – that Schlup participated in the stabbing and then rushed to the head of the line of all the other prisoners from the unit, in full view of at least one correctional officer, without anyone noticing;
>
> – that none of the inmates Schlup ran past would have mentioned that fact to the prison investigators who questioned them shortly afterwards;
>
> – that Schlup did this and went through the checkpoint between the unit and the dining room (at T-3), submitting to a search, without perspiring or breathing hard and without getting any trace of blood or other incriminating evidence on his clothes or person; and
>
> – that Schlup openly talked to prison investigators within minutes of his arrest, long before the existence of the videotape was known, and say nothing that was not later confirmed. (See JA 105-06).

It is also necessary to ignore the fact, which the tape also reveals, that Schlup moved slowly through the dining room cafeteria line, picked up his meal, and started to eat, on his own; but both O'Neal and Jordan came in late, went around the line, sat together, and looked around suspiciously, O'Neal "dripping blood."

Against Schlup's inept defense, the prosecution was able to convince the jury to make all those assumptions, and ignore those counterindications. To do so it had to accept the greatest time estimates of both Sgt. Flowers (regarding the time it took him to get Rodney Stewart under control) and Capt. Eberle

(regarding the time it took him to get to the scene). If either of those estimates were too great, Schlup could not be guilty; and there was evidence inconsistent with both of them. *See* notes 4 and 5, above.

The baseline of evidence on which the jury's verdict rested was therefore "close" and Schlup's defense "plausible." JA 116. Against that, Schlup's submission below raised doubts too strong for any reasonable juror to ignore.[35]

To begin with, to convict Schlup on the present record a juror would have to find that both Lt. Faherty and John Green are lying. Combined with the videotape, any of the things Lt. Faherty says – that Schlup was the first inmate out of the unit; that he watched him walk down the full length of the corridor to T-3; that Schlup was not agitated or breathing hard when he searched him; and that Schlup was in his presence for two and a half and three minutes – nearly conclusively establishes Schlup's innocence.

So does John Green's testimony. If Green made the call to base within seconds of the stabbing – as he told the prison investigators, and as he swears now – the stabbing occurred at a time the tape shows Schlup in the dining room. In addition, if Green is telling the truth, Flowers did not actually see the stabbing – but had reason to falsely claim he did because he was away from his post. And, of course, Green swears that he saw the third perpetrator, and it was Randy Jordan. JA 126. There is ample evidence corroborating that.[36] Green has no

---

[35] *Cf. Strickland v. Washington*, 466 U.S. 668, 696 (1984): "A verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."

[36] Jordan occupied a cell between O'Neal and Stewart; Schlup's cell was six cells away, outside a door that closed off the part of 2-Walk where Jordan, Stewart and O'Neal lived. Exhibit A. Stewart claims that he, Jordan and O'Neal had planned the stabbing, but that he had backed out at the last minute. JA 96. Several other inmates have now also named Jordan. See 15, above. Lt. Faherty identifies Jordan as a known enforcer for the Aryan Brotherhood. Exhibit B-2. Jordan generally resembles Schlup and could easily be mistaken for him by eyewitnesses who got the fleeting glances

connection to Lloyd Schlup and has been a free citizen for eight years. Other than the fact that he once denied having seen the murder – for which he gives the plausible explanation that he feared retaliation, *see* JA 123 – the Respondent has never suggested why Green would risk perjury charges to help out a known murderer.[37] Yet unless that is what both he and Lt. Faherty have done, Lloyd Schlup cannot have committed this crime.

Schlup's claim of innocence is powerful, even without the inmate testimony which the lower courts categorically rejected. Alone, and in another case, evidence from prison inmates might be so suspect as to be categorically disregarded. But it strains credulity that even close friends of the victim, who were with him when he was killed, would lie to spare one of the killers, while identifying two others. Such a scenario is particularly implausible here, where the victim and the closest witnesses on one side, and the killers on the other, are divided by racial and prison gang lines. And that scenario becomes incredible when it is not just a few, but *every single one* of the eyewitnesses who have been identified and given statements, who attest that Lloyd Schlup was not involved.

Against this mounting evidence – gathered without the tools of formal discovery, under the constraints of the prison environment, and years after the fact – the State's case remains what it was at trial: Roger Flowers and John Maylee. Even as their testimony came in at trial, it was evident that it

---

Flowers and Maylee claimed to have had. *See* JA 126, 128. And, as noted above, the videotape shows Jordan slip around to the back of the dining room, behind O'Neal, and join him. JA 96.

[37] Lt. Faherty's affidavit says "While it is true that many inmates cannot be believed, this is not true of all the men who say they saw the crime. John Green, Jack Babcock, Emmett Nave, Joe Beck, and Arthur St. Peter are people who have never lied to me, and I would listen to what they have to say, especially John Green." Exhibit B at 2. As noted above, on the eve of Schlup's execution, Green was given and passed a polygraph, given by a qualified police polygrapher, on all aspects of his statements. *See* notes 23, 24, above.

was subject to the doubts that often accompany eyewitness testimony.[38] That alone, would be sufficient, even now, to square these witnesses' statements with the evidence of Schlup's innocence. But there is more: not only inconsistencies in the testimony the jury never heard, but very real reasons to doubt the credibility of both of these men. *See* pages 14-15 above.

The combination of all this evidence, we submit, goes far beyond raising a reasonable doubt. The evidence of Lloyd Schlup's innocence is substantially stronger than the evidence of his guilt. It is clear and convincing. Though no standard could ever impose such a burden, we believe it approaches proof beyond a reasonable doubt. Certainly, it would be more than enough evidence to support a conviction of Randy Jordan as the third man involved in Arthur Dade's murder.

As Schlup's counsel argued below, even before Lt. Faherty came forward:

> Petitioner has presented a truly persuasive case of innocence. Mr. Schlup has now produced affidavits and statements of fifteen eyewitnesses to the stabbing of Arthur Dade; a videotape showing that he was in the prison dining room when Arthur Dade was stabbed; statements of witnesses who corroborate the fact that the corrections [officers] ran out of the dining room more than a minute after petitioner entered the room, but within seconds of Dade's stabbing; and numerous contradictions and inconsistencies in the testimony of the state's identification witnesses. Furthermore, petitioner has produced sufficient evidence to obtain an indictment and support a conviction against the real culprit, Rocky Jordan. What more would a petitioner

---

[38] "The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1969).

> have to show this Court to prevent his execution without a hearing?

JA 120

The courts below never answered this question, but rejected Schlup's evidence without hearing it. To take such a step without permitting discovery or hearing testimony, they should have indulged every inference, and assumed every factual dispute would be resolved, in Lloyd Schlup's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Blackledge v. Allison*, 431 U.S. 63, 80 (1977) (summary judgment procedures may apply in habeas cases). They did not do that because of the view they took of the miscarriage standard, which made all evidence of innocence irrelevant so long as there was constitutionally sufficient evidence of guilt. See pages 40-41 above.

Again, we submit, that cannot be the law – if for no other reason, because it would permit a capital conviction as doubtful as Lloyd Schlup's to stand. To accept a risk of error as great as the one shown here cannot be what "law and justice require." 28 U.S.C. § 2243. There is too much reason for doubt here to be "satisfied that the interests of justice will not be served by [further] . . . inquiry." 28 U.S.C. § 2244(a).

CONCLUSION

The decision of the Court of Appeals should be reve
The case should be remanded for development of the ev
and a determination of whether a miscarriage of justi
occurred here, under the appropriate constitutional st

Respectfully submitted,

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EXHIBIT A

RELATIVE CELL/WITNESS LOCATIONS IN HOUSING UNIT 5A
Missouri State Penitentiary, February 3, 1984

	70. LLOYD SCHLUP	43. {RICKY EASELY}	
	71.	44.	
GATE	86. ARTHUR S. PETER**	45. {MAURICE FORD}	GATE
	85. [KIRBY ROGAN]	46. JOE BECK***	
	84.	47. <*CHARLES WARD**>	
⬆	83. BERNARD BAILEY**	48. *VAN ROBERSON****	⬆
EXIT	82. RODNEY STEWART***	*49. <A. PHILLIPS***>*	EXIT
	81. [RANDY JORDAN]	50. DONNIE TRENDLY***	
2	80. ROBERT O'NEAL***	51. <AL FRANCO***>	1
W	79. <*WILLIE HILL****>	52. {JEFF SMITH}	W
A	78. [PRUITT]	53. *C. LOVELACE****	A
L	77. *LAMONT GRIFFIN****	54. [WILLIE ROSS]	L
K	76. *WILLIAM FOSTER**	55. *DONNELL WHITE****	K
	75. <*GARY RILEY****>	56. MICHAEL DUNN***	
	74. [JAMES LEWIS]	57. [BROWN]	
	73.	58. *ARTHUR DADE*	
	72. *JAMES PIERCE****	59. STANLEY PRICE***	
GATE		60. JOHN GREEN***	
		61.	
		62. WARREN JOHNSON†	
		63. [BRIAN STROTHERS]	
		64. GARY SONNENBERG***	
		65. *RICKY MCCOY****	

Key

***Eyewitnesses who state Schlup was not involved
** Alibi witnesses who place Schlup outside the Unit
*Witnesses who provide circumstantial evidence for Schlup's alibi
†Warren Johnson believes Dade is not dead

< >Statements not in lower court record
[ ] Not yet located/deceased
{ } Refuse interviews

Italics designate African-Americans

EXHIBIT B

AFFIDAVIT OF ROBERT FAHERTY

Comes now affiant, Robert Faherty, and first being duly sworn, states as follows:

1. I was employed as a corrections officer for the Missouri Department of Corrections from September of 1979 to February of 1989, when I left the department at the rank of captain. In February of 1984, I was a lieutenant. The entire time I was with the department, I was stationed at the Missouri State Penitentiary in Jefferson City, Missouri.

2. On February 3, 1984, I was the Zone Lieutenant for the Special Management Unit. Attached to this affidavit is an accurate diagram of the corridor leading to the area where I was stationed. At lunch time, I was stationed in the dining room. Because no one was available to watch the T-3 door, I stood at that station until I could be relieved by another officer. Then I went to the dining room.

3. The door at T-3 is supposed to be locked except when opened by an officer for inmate movement in and out of the dining room. It is secured at all times. The door was locked when I arrived at the station, and I signalled base control to unlock the door. The officer in the control center unlocked the door by remote control. I opened the door and pushed it back so it would stay open for the lunch traffic.

4. A few seconds after I opened the door, I saw Lloyd Schlup coming down the corridor toward me. He was walking a leisurely pace with his hands in his

pockets. There was nothing unusual about him. Lloyd stopped at a window a few feet from me and shouted at someone outside. I told him to get out of the window, and he came over to the door where I was standing. I patted him down, and he went on to the dining room. Lloyd was not perspiring or breathing hard, and he was not nervous. There was nothing at all about his behavior consistent with his just having been involved in a fight or a stabbing.

5. Other prisoners came down the hall behind Mr. Schlup. Shortly after my encounter with Mr. Schlup, I was relieved by another officer, who I think was Curtis Bittle. I then went to the dining room. I was standing at the rail by the serving line with officer Clementage when I heard an assault broadcast over my radio, and officers ran to the housing unit. I ran with them, but I never made it to the housing unit because I met Captain Eberle at the bottom of the stairs leading to the housing unit, and he sent me outside to recover the weapon that was used in the assault.

6. I have re-enacted my encounter with Mr. Schlup, and I can accurately state that Mr. Schlup was in my presence for at least two and a half minutes, and possibly three minutes. It would have taken him about thirty seconds to get from his cell to my line of sight. After he left me, he had another twenty-five to thirty-second walk to get to the dining room. He arrived in the dining room at least four to four and a half minutes after he left the housing unit. He was in the dining room for a little over a minute when I received the radio call. I am positive that when I received the call, Mr. Schlup had left the housing

unit at least five to five and a half minutes earlier. I do not see how he could have been involved in the stabbing.

7. I am familiar with many of the prisoners who have said that they saw the crime, and while it is true that many inmates cannot be believed, this is not true of all the men who said they saw the crime. John Green, Jack Babcock, Emmett Nave, Joe Beck and Arthur St. Peter are people who have never lied to me, and I would listen to what they have to say, especially John Green. I always thought he would succeed when he got out of prison. He was a unit clerk because he was more credible, reliable and trustworthy than other prisoners, and because he had at least minimal office skills. I am also familiar with Randy Jordan. He was known in the prison by officers and inmates alike as a person in the upper echelon of the Aryan Brotherhood. He had been in many rough prisons across the country and had a reputation as an "enforcer" for the Brotherhood. He was covered with tatoos; I remember one in particular that went clear across his back with the eagle wing symbol of the Aryan Brotherhood. I don't really know Lamont Griffin Bey, Ricky McCoy or Stanley Price, so I can't say anything about them one way or another.

8. At the time of the stabbing, it was written procedure in the housing unit that only one walk would be released for lunch at a time, and the next walk would not be released until all of the prisoners from the other walks had cleared the housing unit. This procedure was not followed on February 3, 1984, because prisoners from two walk were able to get to one walk. This would not have happened had procedure been followed. Sargeant

Flowers was the Housing Unit supervisor, and it would have been up to him to follow post orders.

9. I testified at Lloyd's trial, but I was never asked how long Lloyd and I were together in the hall. I have never talked to a defense attorney about Lloyd's case before today. When I was a corrections officer, I was cynical about prisoners and I believed that they were all guilty, and I would not have voluntarily come forward to talk with a defense lawyer. If a defense lawyer had come to see me, I would not have lied to him, but I wouldn't have volunteered any information, either. It is kind of an unwritten rule among corrections officers not to cooperate with defense lawyers.

10. Lloyd Schlup could not be guilty of this crime. Over the ten years I was at MSP, 1 have seen many fights and stabbings, and the prisoners involved are invariably mad, scared, excited, out of breath, or otherwise obviously hyped up on adrenalin. Lloyd was not any of those things. Also, after learning of all the information in the article, I know that it is not possible that Lloyd could have spent as much time with me as he did and still have been involved in the crime. I have looked at the affidavits and statements of various prisoner, and I recognize several of them as people who are more credible than the typical inmate.

11. I live alone, and I do not have a telephone. A friend read an article in the Columbia Missourian about Lloyd's case and mentioned it to me. I called the paper from a public phone, and they put me in touch with Bill Curry. I am coming forward now because, based on what

I know, Lloyd Schlup cannot possibly be guilty, and saying what I know is the right thing to do.

12. I am willing to testify in court.

FURTHER, AFFIANT SAYS NAUGHT.

/s/ Robert Faherty
Robert Faherty

State of Missouri)
) ss
County of Jackson)

Subscribed and sworn before me this 26th day of October, 1993.

/s/ Beverly S. Taylor
Notary Public

My commission expires:

11/3/93

BEVERLY S. TAYLOR
Notary Public – State of Missouri
Commissioned in Clay County
My Commission Expires
Nov. 3, 1993

(6)

Supreme Court, U.S.
FILED
JUL 11 1994
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No. 93-7901

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

LLOYD E. SCHLUP, JR.,

Petitioner,

v.

PAUL DELO, Superintendent,
Potosi Correctional Center,

Respondent.

On Writ of Certiorari to The
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE[1]

On February 3, 1984, corrections officers released the inmates on Walks 1 through 4 of the Special Management Unit, a high-security facility at the Missouri State Penitentiary to go to lunch. Officers noticed petitioner, Robert O'Neal[2] and Rodnie Stewart[3] running against the flow of traffic from Walk 2 toward Walk 1. Stewart carried a cup containing steaming liquid. As Inmate Arthur Dade walked toward the gate to exit Walk 1, Stewart threw the steaming liquid in Dade's face. According to two eyewitnesses, petitioner then jumped Dade from behind and grabbed his arms while O'Neal stabbed Dade four times in the chest with a homemade ice-pick, killing him.

a. Investigation of the Murder

Following Dade's murder, prison investigators interviewed one hundred individuals, including the inmates in the housing unit and all inmates in the area of the murder (J.A. 137). After a lengthy investigation, prosecutors filed murder charges against petitioner, O'Neal and Stewart. Petitioner's counsel deposed thirty-eight individuals prior to trial, including every guilt witness who testified at trial who was employed by the Department of Corrections (J.A.137).

---

[1]Petitioner's statement of the case is grossly argumentative, misstates facts, and commingles facts with his personal beliefs. Thus, respondent submits the following statement of the case.

[2] *See State v. O'Neal*, 718 S.W.2d 498 (Mo. banc 1986), *cert. denied*, 480 U.S. 926 (1987).

[3] *See State v. Stewart*, 714 S.W.2d 724 (Mo. App. 1986).

Trial counsel also obtained a copy of the tape or transcript of all inmate interviews conducted by prison investigators (J.A. 82; 137). All inmates interviewed either stated that they did not see the stabbing or informed the investigators that they would not state what they saw (J.A. 17). Trial counsel examined and photographed the scene of the crime. (Post-conviction Legal File --hereinafter "P.L.F." -- at 49, 53). Counsel also had available to him all reports available to the State concerning the crime scene as well as all crime scene photographs admitted into evidence (P.L.F. 49).

b. The Trial Evidence

Petitioner went to trial, after a change of venue, in the Circuit Court of St. Charles County on December 9, 1985. The jury found petitioner guilty of murder based on the following facts: Petitioner, along with his two co-defendants Robert O'Neal and Rodnie Stewart, were inmates at the Missouri State Penitentiary and assigned to the Special Management Unit, a high-security housing facility at the penitentiary (Trial Transcript--hereinafter "Tr." -- at 133, 169, 235). Housing Unit 5A, where petitioner was incarcerated, is a building containing eight "walks" (or rows) of cells on four floors (Tr. 169, 185-186, 236-237, 333). Each walk was isolated from the others and was accessible only through a barred gate (Tr. 175-176, 235-237). At mealtimes, four walks were released at a time to go to the dining room (Tr. 236).

Sergeant Roger Flowers was the Sergeant-in-Charge of Housing Unit 5A on the day of Dade's murder (Tr. 234). At approximately noon on Friday, February 3, 1984, Sergeant Flowers released inmates for the noon meal (Tr. 235-236). He first released the inmates housed on Walk 2,

which included petitioner, O'Neal and Stewart. After all the inmates stepped out of their cells, he proceeded to release the inmates housed on Walk 1 which included Dade (Tr. 238-239).

As Sergeant Flowers opened the cells on Walk 1, he noticed that Stewart was walking against the flow of inmates coming out of Walk 1 (tr. 242). As Stewart passed a few feet in front of him, Sergeant Flowers noticed that Stewart was carrying a cup containing steaming liquid (Tr. 242). As petitioner and O'Neal passed a few feet in front of Sergeant Flowers heading toward Walk 1, Stewart threw the steaming liquid in Dade's face (Tr. 242). As Dade raised his hands to his face, Sergeant Flowers saw petitioner jump on Dade's back (Tr. 242). Sergeant Flowers shouted for help, unlocked the gate and entered Walk 1 (Tr. 243). Sergeant Flowers grabbed Stewart as petitioner and O'Neal fled (Tr. 243). Stewart and Sergeant Flowers fought for approximately two minutes before Sergeant Flowers was able to subdue Stewart (Tr. 243).

After apprehending Stewart, Sergeant Flowers escorted him to base control (Tr. 245). There, Sergeant Flowers informed Captain Eberle of the disturbance and identified petitioner as one of the participants (Tr. 245). Sergeant Flowers testified that approximately five to ten minutes had elapsed from the time he first saw Stewart throw the steaming liquid in Dade's face until he met Captain Eberle near base control (Tr. 247).

Sergeant Flowers further testified at trial that the guards on the upper walks were responsible for watching the movement of inmates on the lower walks during their release for meals (Tr. 253). He stated that he in fact had been on Walk 7 in the past and that an officer on Walk 7

can see inmate movement on Walk 1 where the murder occurred (Tr. 253). Likewise, the prosecutor introduced photographs taken from Walk 7 showing the view a guard would have had of Walk 1 (Tr. 253-256).

Officer John Maylee witnessed the murder from Walk 7 where he was assigned on February 3, 1984 (Tr. 331).[4] Officer Maylee saw petitioner, Stewart and O'Neal running against the flow of traffic between Walk 1 and 2 (Tr. 332). Officer Maylee saw Stewart throw the steaming liquid in Dade's face (Tr. 332). He then saw petitioner jump on Dade's back while O'Neal stabbed Dade in the chest (Tr. 339, 342-43). He further observed O'Neal run towards the rear of Walk 1, away from the dining room, approximately thirty to thirty-five feet. He saw O'Neal throw the ice-pick he used to stab Dade through a window (Tr. 338). He did not see the direction petitioner or Stewart fled because he kept his eyes on O'Neal (Tr. 339).

Officer Dan Bowers saw O'Neal go to a utility sink on Walk 2 and wash blood off his hands (Tr. 181-182). Other evidence indicated that the window in which O'Neal had discarded the weapon had been broken and blood was found on the window sill (Tr. 188, 210). Officials later determined that O'Neal had a large laceration on the back of his right hand (Tr. 299, 364).

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[4]Maylee's deposition was read to the jury after the prosecutor stated that Maylee was unavailable. Although trial counsel stipulated that the letter shown to him by the prosecutor would establish unavailability, trial counsel requested that the court rule on the unavailability issue. The court then made a finding that Maylee was unavailable. (Tr. 330).

Lieutenant Robert Faherty, who did not witness the murder, noticed that the T-3 door -- which was between the housing unit and the dining room -- was not manned (Tr. 315). He waited at the door for approximately 10 to 15 seconds until the guard who was assigned to the post arrived (Tr. 303, 307). Faherty arrived at the door before any of the inmates entered the corridor which led from the housing unit to the T-3 door (Tr. 316). After arriving, Faherty saw petitioner coming down the corridor (Tr. 316). He admonished petitioner for shouting out a window unaware at the time that the murder had occurred (Tr. 306). Petitioner proceeded past Faherty in the direction of the dining room (Tr. 306). The window from which petitioner yelled was one floor below the scene of the stabbing and close to where O'Neal had discarded the weapon (Tr. 306).

In addition to the testimony of Flowers and Maylee, the State also produced a videotape showing petitioner entering the dining room and officers responding to the call for help one minute and five seconds after petitioner entered the dining room. Testimony was also produced that the amount of time it took to get from the scene of the murder to the dining room was anywhere from thirty-three seconds to one minute and thirty-seven seconds depending if one walked or ran the distance (Tr. 465-466). Captain Eberle stated that he radioed for help five to ten minutes after first being informed that a disturbance had occurred (Tr. 209, 212, 247).

Petitioner presented the testimony of two inmates, Bernard Bailey and Arthur St. Peter, in support of his defense that he was not in the area of the stabbing (Tr. 443, 452). These inmates claimed that they were walking behind petitioner as he proceeded to the dining room and that petitioner could not have been involved in Dade's violent

death (Tr. 445, 456). After hearing all the evidence, the jury found petitioner guilty of capital murder pursuant to §565.001, RSMo 1978 (repealed 1984) (Tr. 519). At the punishment phase of the trial, the State presented evidence that petitioner had forcibly sodomized a cell mate in the Pettis County Jail (Tr. 547-549) and assaulted a cell mate in the Missouri State Penitentiary (Tr. 566).[5] After hearing the evidence at the penalty phase, the jury recommended a sentence of death (Tr. 660).

c. State Post Trial Proceedings

Petitioner appealed his conviction to the Supreme Court of Missouri, which affirmed the conviction on February 17, 1987, and this Court denied review on June 8, 1987. *State v. Schlup*, 724 S.W.2d 236 (Mo. Banc 1987), *cert. denied*, 482 U.S. 920 (1987). Petitioner filed a post-conviction relief motion under Missouri Supreme Court Rule 27.26 (repealed Jan. 1, 1988) with the Circuit Court of St. Charles County on July 13, 1987. Petitioner's motion alleged, in pertinent part, that his attorneys were ineffective for failing to investigate petitioner's alibi defense and failing to interview Robert O'Neal, Van Robinson, Lamont Griffin and Ricky McCoy (P.L.F. 5); failing to investigate the crime scene to establish the amount of time necessary to travel from the scene of the murder to the dining room (P.L.F. 5); failing to investigate Randy Jordan "who petitioner believes was in fact the third participant" (P.L.F. 6); and that the State failed to disclose exculpatory evidence

[5] The statutory aggravating circumstances found by the jury to make petitioner eligible for capital punishment were petitioner's substantial history of assaultive convictions and that petitioner was in lawful custody of a place of confinement when he committed the murder. *See* §565.012, RSMo 1978 (repealed 1984).

that someone other than petitioner committed the murder (P.L.F. 8). After appointment of counsel and an evidentiary hearing, the circuit court denied petitioner's motion. The circuit court found the following facts:

> 1) Trial counsel fully investigated and presented the alibi defense (P.L.F. 48);
>
> 2) Inmates Van Robinson, Lamont Griffin and Ricky McCoy were not mentioned to trial counsel by petitioner as potential alibi witnesses (P.L.F. 48-50, 52);
>
> 3) Inmates Griffin and McCoy were interviewed by investigators and the reports were provided to defense counsel. Both claimed no knowledge of the murder (P.L.F. 49-50, 52);
>
> 4) Trial counsel did not interview inmate Randy Jordan because petitioner, while maintaining someone else committed the acts attributed to him, refused to give the name of that person to trial counsel (P.L.F. 50-51, 53, 55);
>
> 5) All rumors of involvement in the crime by other persons were investigated by prison authorities and were found to be without foundation (P.L.F. 52, 55);

The Supreme Court of Missouri affirmed the circuit court's ruling, *Schlup v. State*, 758 S.W.2d 715 (Mo. banc 1988), holding as follows:

The motion court found that appellant's rights "were not violated by failure of the State to disclose evidence which would tend to negate his guilt as there was no such evidence to disclose... . A full investigation on the part of correction officials failed to produce any shred of evidence corroborating the rumors and allegations of any other person's involvement." Furthermore, appellant's trial counsel testified that appellant knew who the alleged third attacker was, and the motion court concluded that "Petitioner failed to give the name of the alleged third attacker in the underlying murder to his counsel... . The State cannot be faulted for failing to disclose uncorroborated information apparently known to the Petitioner."

Id. at 717.

d. Federal Habeas Corpus Proceedings

Petitioner filed his first petition for writ of habeas corpus under 28 U.S.C. §2254 in the United States District Court for the Eastern District of Missouri on January 5, 1989. After the appointment of counsel, an amended petition was filed raising, in pertinent part, that (1) trial counsel was ineffective for: failing to investigate his alibi defense, failing to interview witnesses, failing to visit the murder scene and; (2) the State failed to disclose exculpatory evidence. Out of the twenty-six grounds for relief none alleged that petitioner was innocent of the murder. In an Order denying part of petitioner's claims as procedurally defaulted, the District Court found that the

"record does not support any contention that petitioner is 'actually innocent' of the murder charge" (Order at 4 n 1). The District Court denied petitioner's remaining claims on November 21, 1989, finding that petitioner's elaims of ineffective assistance of counsel and claims that the State failed to disclose exculpatory evidence were without merit. Petitioner appealed the District Court's denial to the United States Court of Appeals for the Eighth Circuit, alleging that counsel was ineffective and that the District Court erred in declining to conduct an evidentiary hearing. On July 22, 1991, the Court of Appeals affirmed the District Court's denial, reviewing petitioner's ineffective assistance of counsel claims on the merits. The Court of Appeals held:

> We find that trial counsel's performance was not ineffective under the two-step test of *Strickland*. First, trial counsel was not ineffective under the performance component of *Strickland* in not investigating and calling additional alibi witnesses at the guilt phase of Schlup's trial. Schlup's [principal] argument during trial was that he was innocent of the murder, and he sought to establish that he was not present at the time and place of the offense. Trial counsel called three alibi witnesses, Oscar Dunbar, Bernard Bailey and Arthur St. Peter. Schlup did not advise trial counsel that additional persons, Robert O'Neal, Van Robinson, Lamont Griffin and Ricky McCoy, could also serve as alibi witnesses, and trial counsel did not interview or call any other person as an alibi witness. However, during his preparation for trial, counsel reviewed the testimony given by O'Neal at two

> previous trials of Schlup's co-defendants, and he reviewed statements of Griffin and McCoy which were given to investigators after the murder. Based on his review, trial counsel concluded that O'Neal's testimony could be damaging, and that any other testimony would be repetitive of the testimony to be presented at trial. Counsel was not ineffective in failing to interview and call witnesses whose testimony would be repetitive or potentially damaging, especially when Schlup failed to inform counsel of the possibilities of these witnesses with regard to an alibi defense.

See Schlup v. Armontrout, 941 F.2d 631 (8th Cir 1991), *cert. denied*, ___, U.S. ___, 112 S.Ct. 1273 (1992).

After review by this Court was denied, petitioner filed a motion for relief from judgment under Fed. R. Civ. P. 60(b)(6). The District Court denied petitioner's motion and petitioner declined to appeal (J.A. 69).

Petitioner filed a second petition[6] for writ of habeas corpus with the District Court alleging newly discovered evidence of actual innocence, that the State had failed to disclose exculpatory information involving interviews with inmate witnesses, and ineffective assistance of counsel (J.A.

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[6] This was technically petitioner's third petition for writ of habeas corpus, *See Blair v. Armontrout*, 976 F.2d 1130, 1134 (8th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2357 (1993) (treating a Rule 60(b) motion as a second petition for writ of habeas corpus); *Bolder v. Armontrout*, 983 F.2d 98, 99 (8th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1070 (1993) (same).

69-70).[7] The petition contained numerous affidavits from inmates who, although they originally told investigators they had not seen the murder or would not state what they saw, now allege that they witnessed the murder and claim that petitioner was not involved.[8] Petitioner also claims that the videotape shown at trial, along with the newly created affidavits, prove conclusively that he could not have been involved in the stabbing (Brief at 10). The District Court denied petitioner's successive and abusive petition (J.A. 70, 87) finding that he had failed to establish: (1) cause for failing to file successive claims in the first habeas litigation (J.A. 71-75), (2) a showing of actual innocence entitling him to review of his underlying constitutional claims (J.A. 79, 81, 84, 86-87), (3) merit to the underlying constitutional claims (J.A. 76-79, 82-83), and (4) justification for reconsideration of successive claims (J.A. 86).

Petitioner appealed the District Court's denial of his second habeas petition contending that the District Court erred in finding that he had failed to establish actual

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[7] Inexplicably, petitioner claims that the "fifteen witnesses" listed in his second petition for writ of habeas corpus were "unknown" to trial counsel (Pet. Brief at 15). Eleven of these fifteen inmates were interviewed prior to petitioner's trial and their statements provided to petitioner's counsel.

[8] Petitioner's petition was presented to the lower federal courts in a piecemeal fashion. Petitioner presented some of these affidavits with his petition (J.A. 8 citing Appendix A), in a Supplemental Motion to Expand the Record (J.A. 62), an additional affidavit with his Supplemental Rule 59(e) motion (J.A. 121-25), and more affidavits with his brief on appeal (J.A. 138-39). Petitioner has also informed this court that he intends to present even more affidavits in a Rule 60(b) motion that he intends to file with the District Court after completion of these proceedings. (Brief at 19 n. 24).

innocence in order to raise his claims in the present petition. In affirming the District Court's judgment, the Court of Appeals held that petitioner had asserted "a number of constitutional claims" not raised, or raised and denied in his first petition (J.A. 132). The Court of Appeals found that petitioner's ineffective assistance of counsel claims were addressed on the merits during appeal from the denial of his first petition for writ of habeas corpus despite the fact that these claims were procedurally defaulted in the state courts (J.A. 136). The Court of Appeals also held that counsel was not ineffective during either the guilt or penalty stages "even if we consider the evidence now present[ed]." (J.A. 136). [9]

The Court of Appeals stated that it was trial counsel's very persistence that confirmed the existence of the dining room videotape now used by petitioner (J.A. 137). Trial counsel determined through discovery that one hundred persons were interviewed by prison investigators and "appears to have obtained, for review, the tapes or transcripts of all the statements resulting from these inquires" (J.A. 137). The Court of Appeals noted that the problem was not trial counsel's deficiencies, but rather the changing nature of the information presented by petitioner's potential and actual witnesses who claimed to have been present at or near Dade's murder (J.A. 137).

Petitioner also attempted to discredit the two eyewitnesses who positively identified him. (J.A. 137). The Court of Appeals rejected that attempt on the ground that

[9]The Court of Appeals noted that petitioner's counsel not only "spearheaded" the discovery and defense preparation, but that he had arranged and participated in the taking of thirty-eight depositions including every guilt witness who testified for the State. (J.A. 137).

credibility of eyewitness testimony was for the jury to decide (J.A. 137). The Court of Appeals further rejected petitioner's actual innocence claim based on purported newly discovered evidence, ruling that petitioner "falls" well short of showing by "clear and convincing evidence [that] no reasonable juror would find him [guilty of murder]". quoting *Sawyer v. Whitley*, 505 U.S. ___, 112 S.Ct. at 2514 (1993) (J.A. 138-143).

e. Clemency Proceedings

Currently pending before the Governor of the State of Missouri is petitioner's request for executive clemency (J.A. 3). The Governor, pursuant to §552.070, RSMo 1986, referred the request to a Board of Inquiry, which has taken briefs and evidence on petitioner's claim of newly discovered evidence of actual innocence. *See also Whitaker v. State*, 451 S.W.2d 11, 18 (Mo. 1970) (newly discovered evidence concerning innocence is cognizable in a clemency proceeding).

SUMMARY OF THE ARGUMENT

Petitioner's belated claim of actual innocence attempts to invoke a narrow exception to the rule precluding federal court review of defaulted, successive and abusive claims. Federal court review of a state court conviction seriously intrudes upon state sovereignty and entails significant costs. The intrusion and costs are greatly magnified where, as here, a second petition for writ of habeas corpus is involved.

For these reasons, this Court has repeatedly emphasized that defaulted, abusive and successive claims may be reviewed *only* if cause and actual prejudice is shown, or if petitioner can show that he is actually innocent.[10] Petitioner does not now argue that cause and actual prejudice was shown; rather, petitioner contends that he has shown actual innocence under the standard set forth in *Kuhlmann v. Wilson*, 477 U.S. 436 (1986) (plurality opinion).

Claims of actual innocence, because they are directly contrary to a jury's determination of guilt, are inherently suspect. Because they invite a second (or even third or fourth) tribunal to, in effect, give the defendant a second trial on the merits, they also undermine society's interest in finality. In *Harris v. Reed*, 489 U.S. 255 (1989), Justice O'Connor described actual innocence as "'a kind of safety valve' which should be reserved for the 'extraordinary case' where a substantial claim of factual innocence is precluded by inability to show cause." *Id.* at 271 (O'Connor, J., concurring). Petitioner's evidence does not come close to presenting the "extraordinary case" that Justice O'Connor envisioned. Rather, petitioner repackages and attempts to relitigate evidence presented at trial or evidence known to petitioner before trial.

In *Sawyer v. Whitley*, 505 U.S.___, 112 S.Ct. 2514 (1993), this Court applied the narrow actual innocence

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[10] As this Court ruled last term, the issue of miscarriage of justice, which is typically referred to as actual innocence, is not in and of itself a ground for relief but rather a "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera v. Collins*, 506 U.S.___, 113 S.Ct. 853, 862 (1993).

exception to a death penalty challenge, requiring a prisoner to "show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Id.* 112 S.Ct. at 2517.

Petitioner now contends that *Sawyer* should be limited to claims of actual innocence during the penalty phase. As to guilt phase actual innocence, he would resurrect the standard used by the plurality in *Kuhlmann*, requiring a prisoner to show "a fair probability" that in light of all the evidence, a trier of fact "would have entertained a reasonable doubt of his guilt". *Kuhlmann v. Wilson*, 477 U.S. at 454.

As the Appellate Court correctly held, *Sawyer* should be applied to both guilt and penalty phase issues. It allows for a sufficient review of fundamental miscarriage of justice claims, consistent with the underlying principle that such claims are "a narrow" exception reserved for "extraordinary" cases. Moreover, applying *Sawyer* to guilt phase issues promotes uniformity and prevents diverse results in cases where a miscarriage of justice is alleged on both guilt and penalty phase issues.

Finally, even if this Court were to decline to apply *Sawyer* to guilt phase issues, petitioner would not be entitled to relief. Petitioner has not made a sufficient showing under *Kuhlmann* to pass through the "gateway" and have his defaulted, abusive and successive claims considered on the merits. Assuming he had, the District Court properly held that petitioner's underlying constitutional error claims were without merit in any event. For all these reasons, the sound decision of the Eighth Circuit Court of Appeals should be affirmed.

ARGUMENT

I.

THE COURT OF APPEALS PROPERLY REVIEWED PETITIONER'S CLAIM OF FUNDAMENTAL MISCARRIAGE OF JUSTICE UNDER THE STANDARD SET FORTH IN *SAWYER V. WHITLEY.*

Petitioner's first question for review is whether the standard of *Sawyer v. Whitley*, 505 U.S. ___, 112 S.Ct. 2514 (1992) or *Kuhlmann v. Wilson*, 477 U.S. 436 (1986) (plurality opinion) defines the miscarriage of justice exception for review of defaulted, abusive or successive claims for guilt phase issues. *Sawyer* contains the appropriate test. According to *Sawyer*'s express language, it was meant to "amplify the meaning of 'actual innocence' in the setting of capital punishment". *Sawyer v. Whitley*, 112 S.Ct. at 2519. Its rationale applies with equal, if not greater, force to guilt phase issues than the penalty phase issues presented there. As discussed below, it simply makes no logical sense to utilize two different standards in capital cases--one for the guilt phase and one for the penalty phase. *Sawyer* should be applied here.

a. The History of the Fundamental Miscarriage of Justice Exception

For some thirty years, this Court has struggled with the widespread misuse of the Great Writ, and has sought to protect fundamental principles of federalism, comity and finality which are imperiled by such misuse. Where, as in the case at bar, multiple and dilatory habeas corpus petitions are filed which raise claims never fairly presented

to the state court, this Court has concluded that the above interests require the federal court to decline to review federal constitutional claims regardless of whether they have merit. Review of caselaw will demonstrate this Court's proper emphasis on the principles of federalism and finality in balancing the needs of the criminal justice system with the limited role of federal habeas corpus under 28 U.S.C. § 2254 (1988). *See Teague v. Lane*, 489 U.S. 288, 306-307 (1989) (discussing limited role of habeas corpus as deterrent to state court misconduct in considering constitutional claims).

In *Fay v. Noia*, 372 U.S. 391 (1963), this Court was faced with a claim which had not been presented to any state court. The Court adopted a test allowing the federal courts to deny relief if a prisoner's failure to raise the claim was a deliberate bypass of the orderly procedures of the state courts. *Id.* at 438. Fourteen years later, in *Wainwright v. Sykes*, 433 U.S. 71 (1977), this Court declined to review a defaulted guilt phase issue. The court reasoned that the *Fay* test encouraged "sandbagging" on the part of defense counsel. *Id.*

The *Wainwright* court chose to apply the cause and actual prejudice test announced in *Francis v. Henderson*, 425 U.S. 536 (1976). In doing so, the court said that failure to require compliance with a state's contemporaneous-objection rule would detract from the perception that the trial is a "decisive and portentous event." *Wainwright v. Sykes*, 433 U.S. at 90. Principles of comity require federal courts to respect a state's procedural rule. *Id.* at 88. The rule also promoted finality by allowing early resolution of the constitutional claim when memories are freshest. *Id.* at 88-89. The trial should be the "main event" not a tryout for later habeas review. *Id.* at 90. Although the

cause and prejudice requirement would limit review of procedurally defaulted claims, it would "not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice." *Id.* at 91.

In *Engle v. Isaac*, 456 U.S. 107 (1982), this Court Recognized the toll the Great Writ had in undermining the usual principles of finality of litigation, *id.* at 126-27, in degrading the prominence of the trial and its legal and constitutional protections, *id.* at 127, in frustrating society's right to punish, *id.* at 127-28, and in frustrating the state's attempts to honor constitutional rights, *id.* at 128; thus, the court declined to adopt the habeas applicant's request that the federal court engage in "the more vague inquiry suggested by the words 'plain error'". *Id.* at 135.

In *Murray v. Carrier*, 477 U.S. 478 (1986), the court further described the miscarriage of justice exception as follows:

> Accordingly, we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.

Id. at 496. However, the court did not explain the showing necessary to fulfill this extraordinary exception.

Although the above cases discuss the issue of defaulted guilt phase claims, this Court has also addressed

the cause and actual prejudice standard to a defaulted penalty phase issue. *Smith v. Murray*, 477 U.S. 527 (1986). The Court also announced that while the concept of actual, as distinct from legal, innocence does not translate easily into alleged errors during the penalty phase, the fundamental miscarriage of justice exception applied as a gateway to federal court review of defaulted penalty phase claims. *Id.* at 537-538.

In *Kuhlmann* a plurality of the court declined to review a successive claim without a showing by the prisoner that the ends of justice would be served by reaching the merits of the successive petition. *Kuhlmann v. Wilson*, 477 U.S. at 444-45. The court agreed that the Court of Appeals opinion demonstrated a need for the court to provide guidance as to the "ends of justice" requirement. *Id.* at 445

While acknowledging that 28 U.S.C. §2244(b) (1988) no longer made reference to the "ends of justice" provision of the previous statute, 28 U.S.C. §2244 (1964), the court was cognizant that Congress adopted the 1966 version of §2244 to weigh the interests of the individual prisoner against those of the State. *Id.* at 449. In weighing those interests, the court held that the interest of a prisoner in litigating claims held meritless in earlier habeas litigation did not extend to cases where the prisoner's guilt is conceded or plain. *Id.* at 452. Likewise, the court cautioned that the "ends of justice" exception should be narrow because finality of litigation serves an important State interest noting that release on a successive petition usually occurs years after the crime and when the State's ability to retry the prisoner is frustrated. *Id.* at 453 n. 15.

In determining that the "ends of justice" requirement is met when a prisoner "supplements his constitutional claim with a colorable showing of factual innocence," *id.* at 454, the court adopted the standard from Judge Friendly's article: *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 148-149 (1970). *Id.*[11] A prisoner may make this showing "by establishing that under the probative evidence he has a colorable claim of factual innocence." *Kuhlmann v. Wilson*, 477 U.S. at 454. A prisoner attempting to demonstrate his innocence must make this showing despite a claim that the evidence of guilt may have been unlawfully admitted. *Id.* The court noted that "a prisoner does not make a colorable showing of innocence 'by showing that he might not, or even would not, have been convicted in the absence of evidence claimed to have been unconstitutionally obtained'". *Id.* at 454 n. 17. "Thus, the question whether the prisoner can make the requisite showing must be determined by reference to *all* probative evidence of guilt or innocence. *Id.* (emphasis in original). Judge Friendly defined "all the evidence" as including not only the evidence a prisoner now presents, but also the evidence that was admitted at trial.[12] According to *Kuhlmann*, the

[11]Judge Friendly's article recommended limiting the availability of habeas corpus in situations where there is *de novo* review. This standard would apply to *all* habeas petitions, not merely to abusive, defaulted or successive ones. Whatever merit this proposition has, it need not be decided in this case since the petitioner's claims are both defaulted and abusive for which a higher standard should be applied.

[12]Although Judge Friendly discussed the reliability of illegally admitted evidence, Friendly, *supra* at 160, he did not go as far as petitioner claims and allow a re-determination of the credibility of lawfully adduced evidence. (Pet. Brief at 24).

prisoner may have his successive claim considered when he supplements his claim with new retroactive law or with a factual ground not determined in the first litigation, 28 U.S.C. §2244(b)(1988), and the prisoner supplements that with a "colorable showing of factual innocence." *Kuhlmann v. Wilson*, 477 U.S. 454.

In *McClesky v. Zant*, 499 U.S. 467 (1991), this Court reviewed a second federal habeas petition that raised a guilt phase claim for the first time in federal court. The court determined that the constitutional claim did not demonstrate that the prisoner was probably actually innocent. In order to ensure that the exception remained narrow, the court stressed that probable actual innocence meant that the prisoner did not commit the crime. *Id.* at 502.

Throughout these cases, this Court has continually stressed that the colorable showing of innocence must be made with all probative evidence relating to guilt.

Although *Kuhlmann* discussed the actual innocence of guilt in connection with the "ends of justice" exception to the prohibition to review of successive claims, the Court of Appeals noted that "the contours of this qualification were more clearly delineated" in *Sawyer* (J.A. 134). Keeping in mind that "probable actual innocence" is not in and of itself a ground for relief, but rather "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits," *Herrera v. Collins*, 506 U.S.___, 113 S.Ct. 853, 862 (1993), *Sawyer* properly articulates the probable actual innocence standard this Court has defined as a narrow exception to the prohibition to review of defaulted, successive and/or abusive claims.

b. Policy Reasons For Continuing To Apply *Sawyer* to Guilt Phase Claims

In declining to adopt the standard of actual innocence proposed by the inmate in *Sawyer*, this Court noted that the standard proposed would so broaden the inquiry as to make it anything but a narrow exception to the principle of finality. *Sawyer v. Whitley,* 112 S.Ct. at 2522. Because the fundamental miscarriage of justice is a "narrow" exception reserved for "extraordinary" cases, *id.* at 2519 *citing Dugger v. Adams*, 489 U.S. 401, 412 n. 6 (1989); *McClesky v. Zant*, 499 U.S. at 467, the prisoner should be required to sustain a heavy burden to establish it. *Id.* A challenge to the credibility of State witnesses many years after the trial, which petitioner makes here, destroys the principle of finality that this Court has long sought to enforce.

This Court in *Sawyer* expressly recognized that "[t]his sort of latter-day evidence brought forward to impeach a prosecution witness will seldom, if ever, make a clear and convincing showing" of actual innocence. *Sawyer v. Whitley*, 112 S.Ct. at 2524. Thus, preventing, or least minimizing, this type of "latter-day evidence" in habeas cases was precisely what the *Sawyer* standard was designed to accomplish. It is directly inconsistent with *Sawyer*'s rationale to claim, as petitioner in effect does, that this type of latter-day evidence is somehow more appropriate in habeas cases involving guilt phase issues than those involving penalty phase issues. It is not appropriate in either case, as *Sawyer* correctly indicates. In rejecting the proposition that actual innocence should be extended not only to elements of the crime but also to the existence of aggravating factors and mitigating evidence the *Sawyer* Court held that:

> A federal district judge confronted with a claim of actual innocence may with relative ease determine whether a submission for example, that a killing was not intentional, consists of credible, noncumulative and admissible evidence negating the element of intent.

112 S.Ct. at 2522.

Petitioner requests this court to interpret *Kuhlmann* in a way that would permit federal habeas courts not only to weigh the new evidence, but also to reweigh the evidence presented at trial simply because the constitutional claim to be reviewed was successive, abusive or defaulted. The weighing of evidence presented at trial has been traditionally left to the fact finder. To reweigh evidence presented at trial goes even one step further. This Court must insulate the function of the jury to believe or disbelieve witnesses from judicial scrutiny by federal courts years and perhaps decades after the trial. Of course, all the evidence must be considered by the reviewing court in determining whether the habeas applicant negates, by clear and convincing evidence, an essential element of the offense. *Sawyer v. Whitley*, 112 S.Ct. at 2524.

Actual innocence is a narrow exception allowing review of defaulted, abusive and successive claims. It operates best if subject to "objective standards". *Sawyer v. Whitley,* 112 S.Ct. at 2520. If a prisoner is not required to show more than mere prejudice, the denial of the first federal habeas petition would be meaningless. *Id.* at 2522 & n 13. This Court rejected a "fair probability" standard in *Sawyer*, a standard that would allow the reweighing of all evidence. *Id.* at 2521.

The court should have one standard for determining whether a prisoner is "probably actually innocent" for the purpose of allowing federal court review of defaulted, abusive and successive guilt and penalty phase claims. Petitioner, on the other hand, proposes two standards, *Kuhlmann* for guilt phase claims and *Sawyer* for penalty phase claims. The Court should reject petitioner's paradigm.

First, this Court stated in *McCleskey* its preference for a single standard for reviewing abusive, successive and defaulted claims. 499 U.S. 493-96. The Court extended the cause-prejudice-actual innocence exception to evidentiary defaults in *Keeney v. Tamayo-Reyes*, ___ U.S.___, 112 S.Ct. 1715 (1992). One of the rationales was to advance uniformity in habeas corpus law. *Id.* Application of a uniform test has long been a concern of this Court. *See Keeney v. Tamayo-Reyes,* 112 S.Ct. at 720. Advancement of a uniform test promotes certainty. Application of different standards for guilt and penalty phase claims promotes inconsistent results and results in injustice. This Court has recognized that there are similarities between a trial on guilt and a capital punishment sentencing proceedings. *Bullington v. Missouri*, 451 U.S. 430 (1981). Therefore, the application of the same test for determining actual innocence should be applied.

Second, petitioner's dichotomy assumes the existence of two separate standards, one from *Kuhlmann* and one from *Sawyer*. The Court of Appeals was unwilling to assume the existence of separate standards. (J.A. 134). *See also Johnson v. Hargett,* 978 F.2d 855 (5th Cir. 1992). The *Sawyer* Court was well aware of *Kuhlmann, e.g. Sawyer v. Whitley*, 112 S.Ct. at 2518, 2519 & n. 5, as it

described the "probable actual innocence" exception. *Id.* at 2518.

Third, the Court should not have a lower standard for guilt phase claims, otherwise, penalty phase claims litigated in a first habeas litigation will reappear in second habeas litigation as guilt phase claims. An example illustrates: If petitioner alleged ineffective assistance of counsel because he did not present a lingering doubt defense or a psychological defense at the penalty phase, and habeas relief was denied, habeas court one would have issued an opinion detailing the defects of the claim. The prisoner in the second habeas litigation, under a (perceived) lower *Kuhlmann* standard, will attempt to revive the claims and relitigate them as guilt phase claims. If the claims cannot be relitigated under *Sawyer* as to the penalty phase, they should not be relitigated as guilt phase claims.

The Fifth Circuit standard adopted by this Court in *Sawyer v. Whitley*, 112 S.Ct. at 2517, was no more than a translation of *Kuhlmann* to guilt and penalty phase issues. The Fifth Circuit's rationale for this standard was that a prisoner must show a fair probability that a rational trier of fact would have entertained a reasonable doubt to the existence of those facts which are a prerequisite to impose the death penalty. *Sawyer v. Whitley*, 945 F.2d 812, 821 (5th Cir. 1991), *aff'd*, 505 U.S. ___, 112 S.Ct. 2514 (1993).

To give the term "fair probability" a broader meaning would violate the province of the fact finder to believe or disbelieve the issues presented at trial and substitute for the fact finder's judgment that of the court who has heard the claims of innocence years after the trial. Because the function of a trial is the search for truth, to interpret "fair probability" as something less than the clear

and convincing standard would result in the application of a subjective standard of review contrary to this Court's intent. *Sawyer v. Whitley*, 112 S.Ct. at 2520. To apply a standard allowing relief by a mere showing that the trier of fact "would have entertained a reasonable doubt" as to guilt undercuts the objective standard this Court sought to implement in reviewing claims of actual innocence. A claim of actual innocence must do more than "call into question the reliability of an adjudication of legal guilt." *Murray v. Carrier*, 477 U.S. at 495.

This Court noted in *Sawyer* that "in the context of a noncapital case, the concept of 'actual innocence' is easy to grasp." *Sawyer v. Whitley*, 112 S.Ct. at 2520. While such claims are regularly made on motions for new trial, these are routinely denied because they failed to meet the rigorous standard for granting of such motions. *Id* at 2519. For instance, many federal courts have adopted a five part test in order for a federal defendant to obtain a new trial based on newly discovered evidence. *See, e.g. United States. v. Wright* , 625 F.2d 1017 (1st Cir. 1980); *United States v. Herman*, 614 F.2d 369 (3d Cir. 1980); *United States v. Pena*, 949 F.2d 751 (5th Cir. 1991); *United States v. Tierney*, 947 F.2d 854 (8th Cir. 1991); *United States v. Krasney*, 607 F.2d 840 (9th Cir. 1979), *cert. denied*, 445 U.S. 942 (1980); *United States v. Maestas*, 523 F.2d 316 (10th Cir. 1975); *United States v. Reed*, 887 F.2d 1398 (11th Cir. 1989), *cert. denied*, 493 U.S. 1080 (1990). This showing requires that:

> (1) the evidence in fact is newly discovered, (2) the movant has shown due diligence, (3) the new evidence is not "merely cumulative or impeaching," (4) the new evidence is material to relevant issues, and (5) on retrial, "the newly discovered evidence would probably produce an acquittal."

United States v. Tierney, 947 F.2d at 862, *quoting United States v. Begnaud*, 848 F.2d 111, 113 (8th Cir. 1988).

The fair probability standard enunciated in *Kuhlmann* was amplified in *Sawyer*. To hold otherwise would allow a lower standard of review for claims of new evidence raised years after the state trial than it would for claims of new evidence presented in a motion for new trial in a federal criminal case. This Court must insulate the discretionary function of the jury to believe or disbelieve witnesses from judicial scrutiny.

Likewise, lower courts have applied the *Sawyer* standard to review claims of actual innocence relating to guilt recognizing that *Sawyer* simply clarified *Kuhlmann*. *See Washington v. Tames*, 996 F.2d 1442, 1447 (2d Cir. 1993) (applying *Sawyer* to guilt phase default); *Hull v. Freeman*, 991 F.2d 86, 91 n. 3 (3d Cir. 1993) (applying *Sawyer* to guilt phase claims in dicta); *Spencer v. Murray*, 5 F.3d 758, 766-67 (4th Cir. 1993), *cert. denied* , ___ U.S. ___, 114 S.Ct. 1208 (1994) (applying *Sawyer* to discovery claim); *Spencer v. Murray*, 18 F.3d 229, 236 (4th Cir. 1994) (holding that *Sawyer* is not limited to penalty phase errors); *Kirkpatrick v. Whitley*, 992 F.2d 491, 495 (5th Cir 1993) (remanding cause to district court to apply *Sawyer* standard to guilt phase issues); *Verdin v. O'Leary*, 972 F.2d 1467, 1483 (7th Cir. 1992) (remanding cause to district

court to apply *Sawyer* standard to guilt phase issues); *Clark v. Lewis*, 1 F.3d 814, 824-25 (9th Cir. 1993) (applying *Sawyer* to guilt phase issues); *United States v. Richards*, 5 F.3d 1369, 1371 (10th Cir. 1993) (applying *Sawyer* to §2255 guilt phase issues); *Ballinger v. Kerby*, 3 F.3d 1371, 1375 (10th Cir. 1993) (applying *Sawyer* to *Brady* claim impeaching the witnesses in guilt phase issue).

II.

THE COURT OF APPEALS PROPERLY APPLIED THE *SAWYER v. WHITLEY* STANDARD TO PETITIONER'S CLAIM OF FUNDAMENTAL MISCARRIAGE OF JUSTICE.

Petitioner's second question presented for review is if *Sawyer v. Whitley*, 505 U.S. ___, 112 S.Ct. 2514 (1992) applies to guilt phase issues, does it require petitioner to show that the evidence of guilt was constitutionally insufficient to support the conviction under *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (Pet. Brief 35).

Petitioner admits that the Court of Appeals did not "explicitly state that it was equating the *Sawyer* standard with *Jackson's*," but rather petitioner argues that the logic of the Court of Appeals decision "makes clear that it did so" (Pet. Brief at 35).

Because the Court of Appeals did not cite to or rely on *Jackson* in determining that petitioner failed to meet the standard for review of his claims, the issue of whether *Jackson* should apply is not ripe for review. *See Herrera v. Collins*, 506 U.S. ___, 113 S.Ct. 853, 871 (1993) (O'Connor, J., concurring). Simply because petitioner equates the Court of Appeals opinion as applying *Jackson* to fundamental miscarriage of justice claims involving guilt phase issues does not demonstrate that the Court of Appeals did so. Petitioner merely speculates that the Court of Appeals implicitly applied *Jackson* in his case. This speculation does not warrant review of this question.

Furthermore, respondent does not contend that *Sawyer* requires a habeas petitioner to show that the

evidence of guilt was constitutionally insufficient to support a conviction. Rather, as previously discussed, *Sawyer* clearly places on the habeas petitioner the burden of presenting credible, noncumulative and admissible evidence that negates an essential element of the offense. This is significantly different then reviewing the evidence presented at trial as allowed by *Jackson*, because *Jackson* only reviews recorded evidence. Since *Jackson* does not allow review of unrecorded evidence, *Jackson* does not apply to claims of newly discovered evidence of actual innocence.

III.

PETITIONER CANNOT SHOW BY ANY STANDARD THAT HE MEETS THE FUNDAMENTAL MISCARRIAGE OF JUSTICE EXCEPTION.

Although petitioner contends that the evidence that he is innocent of this crime is "more than extraordinary" and "approaches a conclusive demonstration" (Pet. Brief at 42), petitioner's newly developed evidence is of the type juries hear and reject everyday in this nation's trial courts. In fact, petitioner advanced this theory of actual innocence at his trial. Furthermore, petitioner now presents two mutually exclusive theories for his actual innocence. Thus, petitioner cannot show by any standard that he meets the narrow fundamental miscarriage of justice exception. In order to believe that petitioner's evidence conclusively shows he is actually innocent, one must: (1) disbelieve the State's two eyewitnesses; (2) believe petitioner's witnesses even though they have changed their versions of what they originally observed; and (3) ignore evidence that petitioner could have participated in the murder and still have gone to the dining room at the time depicted on the State's videotape.

Petitioner's newly developed evidence does not establish that petitioner was far from the scene of the crime. Nor does petitioner's evidence negate an element of the offense. Did petitioner participate in the offense and still have sufficient time to be first in line for lunch? The evidence at trial clearly demonstrated beyond a reasonable doubt that petitioner had sufficient time to participate in the murder and easily make it to the dining room to be the first

in line for lunch.[13] Not only did two eyewitnesses identify petitioner as a participant in the murder (Tr. 234-260, 331), [14] but investigators also testified as to the amount of time it took to get from the scene of the murder to the dining room located only a couple of hundred yards away (Tr. 363-398). Guards also testified to the amount of time that passed before the murder was called into base control over the radio (Tr. 205-213).

a. The State's Videotape Supports Petitioner's Guilt, Not His Innocence.

Petitioner claims that in order to discount the videotape, one must assume that petitioner was able to rush to the head of the lunch line, past at least one guard, without being noticed. However, petitioner does not account for the fact that O'Neal was able to slip past the guards responding to the murder from the dining room

[13]Petitioner contends that his conviction was due to the prosecutor's ability to convince the jury to accept the greatest time estimates as to the amount of time it took for Sergeant Flowers to apprehend Stewart and the amount of time before the murder was radioed in (Pet. Brief at 43). This argument, in effect, admits that the issue was a question of fact for the jury. The videotape does not demonstrate actual innocence. This is not a case in which a videotape, such as a bank robbery, conclusively shows who committed the offense.

[14]Although petitioner refers to articles that question identification testimony, petitioner appears to forget that both Maylee and Flowers knew petitioner for years prior to the murder. Sergeant Flowers stated that he had known petitioner, O'Neal, Stewart and Dade for approximately two to three years before the murder occurred (Tr. 235). This is not the typical identification testimony from a victim robbed on the street, but rather this crime occurred in a controlled setting and the identification is akin to that of a family dispute gone awry.

unnoticed even though his hand was bleeding profusely.

Petitioner also claims that one would have to assume that none of the inmates would have told investigators that petitioner ran past them toward the dining room. Petitioner ignores the fact that his affiants waited some eight years to claim they witnessed the murder.

Petitioner further alleges that in order to discount the videotape, one would have to assume that petitioner was able to proceed through the T-3 door, were he was subjected to a search, without showing signs of perspiration, shortness of breath, or other incriminating evidence on his clothes or person. First, although Robert Faherty now claims to have searched petitioner, his testimony at trial did not state this fact (Tr. 307). Moreover, testimony at trial did establish that petitioner had incriminating evidence on him in that petitioner had two scratch marks on his neck (Tr. 368-369, 406).[15]

b. The Inmate Affidavits Are Inconsistent and Incredible.

Although petitioner presented the District Court with a number of affidavits from inmates who proclaim petitioner's innocence, many of these affiants were questioned shortly after the incident and told investigators that they either did not witness the murder or would not

[15]Although petitioner claims that O'Neal was "dripping blood" while he had no blood on him (Pet. Brief at 43), petitioner fails to note that O'Neal sustained a large laceration after breaking the glass to dispose of the murder weapon (Tr. 299, 364).

state what they saw (J.A. 17).[16] Amazingly, eight years later these same individuals now graphically recall that petitioner was not involved. It is no wonder that the District Court rejected these affidavits as lacking credibility (J.A. 79). Fed. R. Civ. P. 52(a). Some of the affiants who have now come forward on petitioner's behalf even testified at the trial of petitioner's co-defendant, Rodnie Stewart, which occurred before petitioner's trial. In fact, John Green, upon whom petitioner heavily relies, testified at Stewart's trial.[17] Although petitioner claims these affiants did not come forward out of fear, one must question why the affiants, such as Green, felt no fear to testify at Stewart's trial but allegedly feared testifying at petitioner's trial approximately one year later.

The affidavits of Darnell White, Joseph Beck, Ricky McCoy and John Green not only contradict their prior statements to investigators, but also contradict each other (J.A. 143). For instance, White now states three white men, one carrying a tumbler, committed the murder although he told investigators he did not see anything (J.A. 143). Likewise, Beck now claims two individuals were involved in the murder even though he told investigators he did not see the murder but only saw a guy laying on the floor with blood coming out his mouth. In fact, he stated he did not see the murder because he was in his cell putting away a

[16]The piecemeal and dilatory nature of Petitioner's claims of actual innocence is demonstrated by the fact that petitioner claims to have located additional witnesses and that he intends to present these witnesses in a Rule 60(b) motion filed after completion of these proceedings. (Pet. Brief at 19 n. 24).

[17]Petitioner claims Green is a credible witness because Faherty's affidavit says so (Pet. Brief at 45 n 37).

broom.

Even though Lamont Griffin's affidavit stating that Stewart threw liquid in Dade's face while O'Neal stabbed Dade is consistent with his statement to investigators, he did not know "none of those dudes" (J.A. 143). Griffin's affidavit also claims that Sergeant Flowers grabbed the wrong guy although he told investigators that Sergeant Flowers grabbed the one who threw the liquid in Dade's face. McCoy, who was deposed by petitioner's counsel, stated that he just carried the stretcher and did not see the murder. McCoy's present affidavit contradicts both his statement to investigators and his testimony during his deposition. Petitioner also submitted affidavits from Emmett Nave, Dave Cocoran and Darnell Duckett. These individuals, however, were not even housed on Walks 1 through 4 (J.A. 18).

Likewise, petitioner's reliance on affidavits from O'Neal and Stewart, both of whom were charged and convicted for the same offense, is questionable at best. O'Neal's claim that petitioner was not involved is self-serving since he readily admits his participation in the murder of Dade but claims he acted alone and in self-defense. (J.A. 18). Stewart's affidavit also alleges petitioner was not involved. Stewart, however, maintains he is innocent while petitioner alleges that Stewart was involved. (J.A. 18). These conflicting theories are predictably self serving and patently contradictory.

As previously indicated, petitioner relies heavily on an affidavit from a former inmate named John Green. However, petitioner's theory that Green conclusively demonstrates that petitioner is actually innocent depends on which of the three versions Green has described that one

chooses to believe (J.A. 140). Green's first version was given to investigators on February 8, 1984. Green told investigators that he did not observe the murder. Rather, he told investigators that he was working as a clerk in the office when he heard Sergeant Flowers calling for help because there was a fight. Green stepped out of the office after hearing Sergeant Flowers call for help and saw Dade fall to the floor in front of the office. He stated that when Sergeant Flowers could not get anyone to assist him, Sergeant Flowers told Green to call base and notify them that a fight was in progress. (J.A. 140). Green's latest affidavit that he phoned in the stabbing within seconds of Dade hitting the floor is inconsistent with both the trial testimony, and Faherty's recent affidavit that petitioner was in his presence for two and one half to three minutes (Pet. Brief at 10).

Green's second version was presented at the trial of Rodnie Stewart on September 5, 1984 (J.A. 140). At Stewart's trial Green testified under oath that he was in the office when he heard Sergeant Flowers shouting "fight". He further testified that when he heard Sergeant Flowers shouting he got up and went to the office door and "just watched what was going on". While standing at the door Green saw Dade running towards the office where he was standing, and that he observed Dade run into Stewart near cell No. 43. After Dade collided with Stewart both men fell to the floor. He also observed Sergeant Flowers apprehend Stewart upon which he returned to the office and "waited there to find out what kind of report I was going to have to type up" (J.A. 140). On cross-examination Green acknowledged that he did not see the fight and that by the time he got up after hearing Sergeant Flowers shouting and walked to the door "[m]ost of the people in the walk had already left, went on down to the main line [dining room]"

and that the only individuals he saw still on the walk were Dade, Stewart and Dunn. Green also acknowledged that Sergeant Flowers was closer to the fight, a lot closer to the fight than he was, and that he knew the same day that the murder occurred that petitioner, O'Neal and Stewart had been picked up. In fact, he stated it was common knowledge among inmates that petitioner, O'Neal and Stewart were charged with the murder.

Green's third version was presented in his affidavit to the District Court during petitioner's Fed. R. Civ. P. 59(e) motion. Green's affidavit states that he was standing next to Sergeant Flowers at the 1 walk lever when he saw Jordan and O'Neal stab Dade (J.A. 139). His affidavit claims that he did not come forward earlier because he feared reprisal and because he did not know petitioner had been arrested.

Given these dramatic inconsistencies, petitioner's evidence falls far from the level required to establish that one is actually innocent. The inmate affidavits vary from O'Neal who claims he was the lone individual involved, to Beck and Griffin claiming only two individuals committed the murder, to White who claims three individuals were involved.[18] Petitioner does not negate an essential element of the offense.

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[18]Although petitioner claims that Green's affidavit points to Jordan as being the third participant in the murder, Green only names two individuals as being involved.

c. The Affidavit Of Robert Faherty Is False And Inconsistent.

The affidavit of Robert Faherty, a former prison guard, is suspect as well.[19] Faherty not only testified at petitioner's trial, but testified at the trial of Robert O'Neal and was deposed by petitioner's counsel long before petitioner's trial ever occurred (J.A. 140).[20]

Faherty's affidavit that no one asked him previously about relevant times is patently false. At O'Neal's trial, Faherty testified that he saw petitioner yelling out the window approximately one to two minutes before he received the radio transmission about the stabbing. He further testified that it took him thirty to forty-five seconds to get back to the housing unit after receiving the call. Moreover, petitioner himself testified at O'Neal's trial as a witness but did not refute Faherty's testimony. Nor did he ever indicate that he spent three minutes in Faherty's presence. In fact, petitioner testified at O'Neal's trial that Faherty "shook me down" and that the shake down took approximately twenty to thirty seconds. Petitioner's own testimony is inconsistent with Faherty's affidavit in which he now says petitioner was in his presence for three

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[19]The Court of Appeals noted that nothing in the record supports either petitioner's claim that Faherty retired or respondent's claim that he was fired (J.A. 138, n. 2). Faherty's affidavit was presented for the first time on appeal.

[20]Petitioner claims that Faherty was not asked the right questions at trial (Pet. Brief at 10 n 11). For instance, petitioner contends Faherty was not asked how long petitioner was in his presence (Pet. Brief at 10). However, the Court of Appeals found that Faherty was at the T-3 door for only ten to fifteen seconds (J.A. 140-41).

minutes.

Petitioner did not testify at the guilt stage of his trial. However he presented the testimony of two inmates, Bernard Bailey and Arthur St. Peters. Bailey testified that petitioner was in front of him going down the hallway to the dining room. He further stated that nothing unusual happened and that petitioner passed through the T-3 door and continued on to the dining room. Bailey never mentioned petitioner being stopped by Faherty. Nor did Bailey testify that Faherty stopped him. If Faherty had stopped petitioner for three minutes, as Faherty now claims, Bailey and St. Peters would have passed petitioner and would have been the first in the dining room which is contrary to the video tape.

The most significant testimony is that of Faherty himself at petitioner's trial. At petitioner's trial, Faherty testified that he manned the T-3 post for no more than ten or fifteen seconds (J.A. 140-41). If Faherty had manned the post for only ten or fifteen seconds how did he detain petitioner for three minutes at the T-3 post as Faherty now claims?[21] Nor did Faherty ever mention shaking down petitioner. Faherty testified that after he yelled at petitioner, petitioner proceeded past him into the direction of the dining room (J.A. 141). As previously stated, Faherty's last affidavit is not new evidence but rather evidence petitioner attempts to re-develop.

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[21]This may be the passage of time and erosion of memory problem this Court has previously discussed. Given that Faherty's memory of events would have been fresher at or near the time of the event rather than eight years later, the Court of Appeals correctly notes that the testimony at trial is more reliable.

Claims of actual innocence, asserted for the first time years after a conviction, have become disturbingly commonplace in federal habeas corpus litigation. *See, e.g., Smith v. Armontrout*, 888 F.2d 530, 540-44 (8th Cir. 1989), *stay denied*, 493 U.S. 1039 (1990); *Ellis v. Collins*, 956 F.2d 76, 78-79 (5th Cir.), *cert. denied*, ___, U.S. ___, 112 S.Ct. 1285 (1992). The collection of false and inconsistent affidavits which has been packaged by petitioner nine years after his conviction as "new" evidence of his innocence is not significantly different from claims by a large proportion of other inmates who file second or successive petitions at the last minute as they approach execution. This Court should hold, in accordance with *Sawyer*, that the new evidence petitioner presents fails to negate the elements of the crime of capital murder; thus, federal court review of petitioner's defaulted, abusive and successive claims are barred.

CONCLUSION

WHEREFORE, for the reasons herein stated, respondent respectfully requests that this Court apply the standard announced in *Sawyer* to guilt phase issues and find that petitioner failed to establish a fundamental miscarriage of justice and affirm the decision of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1994

LLOYD E. SCHLUP, JR.,

Petitioner,

v.

PAUL DELO, Superintendent
Potosi Correctional Center,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

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STATUTE:

28 U.S.C. § 1254(1) 1

ARGUMENT

Respondent and its amici present no persuasive reason the Court should overrule *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), and the cases which have held that its standard governs claims of true innocence like Lloyd Schlup's. Nor do they defend the "miscarriage of justice" standard actually used by the Eighth Circuit Court of Appeals in rejecting Mr. Schlup's claim because there was some evidence the jury could have credited which implicated him in Arthur Dade's murder. *See* J.A. at 174-75, Pet. Brief at 35-36.[1] Their legal arguments are adequately addressed in Petitioner's Brief and need no reply. We are constrained to respond to respondent's attack on the evidence that supports Mr. Schlup's claim of innocence.

The evidence tendered in support of Mr. Schlup's claim of innocence includes:

(1) direct and circumstantial evidence in support of his defense of alibi;

(2) direct and circumstantial evidence that Randy a/k/a Rocky Jordan and not petitioner helped Robert O'Neal kill Arthur Dade;

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[1] Respondent says the second question on which certiorari was granted in this case "is not ripe for review" "[b]ecause the Court of Appeals did not cite or rely on *Jackson [v. Virginia*, 443 U.S. 307 (1979)]." (Resp. Brief 35). This argument is transparently without basis in this Court's jurisprudence, which "does not depend on citation to book and verse," *Eddings v. Oklahoma*, 455 U.S. 104, 103 n.9 (1982) – especially in federal cases, where the Court's jurisdiction is plenary. 28 U.S.C. § 1254(1).

Respondent says nothing on the merits of this point – neither explaining how the Court of Appeals' analysis can be distinguished from the *Jackson* standard, nor arguing that the *Jackson* standard is consistent with *Sawyer v. Whitley*, 112 S.Ct. 2514 (1992).

(3) direct and circumstantial evidence that the state's key witnesses lied to the jury.[2]

Through no fault of Mr. Schlup's (See Pet. Brief at 7-9), this substantial evidence of Mr. Schlup's innocence has never been heard in any court. Therefore, much of respondent's argument is based upon speculation and incorrect interpretation of many of the witness affidavits.

Respondent's claim that "all inmates interviewed either stated that they did not see the stabbing or informed the investigators that they would not state what they saw" (Resp. Brief 2) is refuted by the record. Several inmates admitted to the investigators that they saw the crime, and freely answered what few questions they were asked. (J.A. 31, Respondent's Exhibit T, Exhibits 1A, 2, 14). Though respondent states that several of these inmate statements were provided to trial counsel, (Resp. Brief at 11 n.7), trial counsel provided an affidavit stating that he

> . . . has never seen or been provided any oral or written statements by any inmate who was present in the housing unit at the time of Arthur Dade's stabbing who admitted to having seen the homicide or who stated that Mr. Schlup was not involved. . . . Affiant had no discovery whatsoever from the state that indicated that any person other than corrections officers Flowers and Maylee had seen the stabbing of Arthur Dade. If affiant had such reports in his possession or if he had read such reports, he would remember it because this information would have been very important to Mr. Schlup's defense.

(Exhibit 9C, p. 2). Trial counsel did not interview any witnesses who were known to be present at the scene of the crime. (J.A. 11) His only effort in this regard was his unsuccessful attempt, in Robert O'Neal's presence, to depose Ricky McCoy. It is not surprising that, in the presence of the actual killer, McCoy refused to admit that he saw the murder.

Though a number of inmates refused to cooperate with prison investigators, the race-related gang tensions in the housing unit at the time of the murder suggest that they remained silent for fear of reprisal. (J.A. 31, 33, 93-94). In light of testimony and evidence that the stabbing took place on a crowded cell block, it is not reasonable to believe that only four prisoners saw the murder. For example, although Joe Beck told investigators that he was in his cell putting away his broom, he said he did not see the murder. (Resp. Brief 34). All testimony and physical evidence shows that Dade was stabbed directly in front of Beck's cell; Beck could not avoid seeing the crime. (Pet. Brief Appendix 1).

Respondent's attacks on the credibility of Lamont Griffin and Ricky McCoy are based upon misstatements of the record. Respondent states: "Griffin's affidavit also claims that Sgt. Flowers grabbed the wrong guy although he told investigators that Sgt. Flowers grabbed the one who threw the liquid in Dade's face." (Resp. Brief 35). Griffin's affidavit actually says, "The first thing I saw of

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[2] Respondent does not explain his allegation that petitioner presents "two mutually exclusive theories for his actual innocence." (Resp. Brief 31.) Mr. Schlup's sole defense is that he is completely innocent.

the fight was Rodney Stewart throw liquid in Arthur Dade's face, . . . after I saw O'Neal throw the knife out the window, I saw Flowers come onto the walk and then I saw him grab Stewart." (Exhibit No. 1, pp. 2-3). There is no contrary statement in his affidavit. Respondent claims that "McCoy's present affidavit contradicts both his statement to investigators and his testimony during his deposition." (Resp. Brief 35) There is no affidavit in the record from McCoy, although he is available to testify.[3]

Respondent claims that Emmett Nave, Dave Corcoran and Darnell Duckett "were not even housed on walks one through four," citing as authority for this his own counsel's statement to the district court that "these individuals were not housed in the *same walk* in which the stabbing occurred." (J.A. 18, emphasis added). Respondent's own Exhibit T establishes that these witnesses were in fact occupants of the housing unit where Arthur Dade was stabbed, and Exhibit 8 indicates that Duckett was one of the prisoners who admitted having seen the stabbing. (J.A. 31).

Although Rodney Stewart continues to assert his innocence of the murder of Dade, his statement to investigator Larry Bodinson is particularly trustworthy because it is clearly against Stewart's penal interest. Stewart told Bodinson that he participated in discussions between Robert O'Neal and Rocky Jordan planning the homicide of Arthur Dade, and that O'Neal had asked him to assist

[3] There are only two statements in the record from McCoy. In February, 1984, McCoy told investigators that he saw O'Neal and Stewart attack Dade. At his deposition, McCoy refused to repeat his account in O'Neal's presence. (Exhibit 2).

in the murder. He was present at the scene of the crime, and saw Jordan hold Dade while O'Neal stabbed him. (Exhibit 16).

With respect to John Green, there is no inconsistency between his statement to investigators, his testimony in the Stewart trial and his affidavit describing his telephone call to base control. In his interview with the prison investigators on February 8, 1984, Green was not asked how long it took him to make the telephone call nor was he asked this question in the Stewart trial.[4] (Exhibit 4A). There is no conceivable reason for Green to lie about the phone call in February of 1984; he could not have known about the video tape or the importance of his phone call to the case. (J.A. 36, 91). The record shows that Green has only once been asked how long it took him to make the call, and his only response was that he did so within seconds of Arthur Dade hitting the floor. (J.A. 122). Respondent also does not explain how Green's testimony is inconsistent with Faherty's affidavit. Together, they show that Mr. Schlup was not at the scene of the crime.

Green explained that he denied having seen the murder on earlier occasions because he feared reprisal. (J.A. 124). Now that he is out of prison, "he is no longer afraid to let the truth be known." (J.A. 148). Green identified a photograph of Rocky Jordan as "the man who held Arthur Dade while O'Neal stabbed him," a photograph of Robert O'Neal as "the man who stabbed Dade while

[4] In Stewart's trial the timing of the telephone call was not at issue because Stewart was caught at the scene.

Jordan held him," and a photograph of Rodney Stewart as "the man Sgt. Flowers took downstairs after Dade was stabbed." (J.A. 112, 126-29). Neither Green nor any other eyewitness to the crime has truly been tested by the crucible of cross examination.

Respondent's attempt to discredit former prison Captain Robert Faherty is also based upon a misinterpretation of the record. Faherty does not claim that he "stopped petitioner for three minutes." (Resp. Brief 39). Faherty's affidavit obviously covers the time interval which includes Mr. Schlup entering the T-3 corridor at the head of the line, walking most of the length of the 100 yard corridor, stopping at the window and being reprimanded for the same,[5] walking the remainder of the corridor and being subjected to a pat down search before continuing to the dining room.[6]

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[5] The state has claimed that Schlup's actions at the window are evidence of his complicity in the crime because the window was one floor below the window where O'Neal ejected the murder weapon. (Resp. Brief 5). However, the testimony at trial established that the area outside the housing unit was separated from the rest of the prison grounds by a high fence topped with razor wire, and any prisoner in the yard would have been escorted by a corrections officer. (Trial Tr. 314).

[6] It was prison policy to subject as many prisoners as possible to a pat-down search at the T-3 door. Faherty's affidavit is consistent with Schlup's statement to prison investigators, his testimony in the O'Neal trial and Faherty's own trial testimony. (Trial tr. 307). A pat-down search at that station is simply part of the prison routine; Bernard Bailey's testimony that nothing unusual happened on the way to the dining room cannot be construed to mean that no pat-down searches occurred. It is likely that Bailey and other inmates were likewise subjected to a pat-down search.

Faherty's trial testimony is ambiguous about how long he was with Mr. Schlup. Officer Faherty was asked how long he spent at the T-3 post in two separate contexts, first relating to the time between Faherty's arrival at his post and his encounter with Mr. Schlup (Trial Tr. 303), and second regarding the time between Mr. Schlup's departure and the arrival of the officer who relieved Faherty at the T-3 post. (Trial Tr. 307). Faherty explained that he "was never asked how long Lloyd and I were together in the hall." (Faherty Affidavit, p. 4). It was only the inaction of trial counsel that allowed the prosecutor to condense the three minute time span in which Lt. Faherty says he had Mr. Schlup in sight to the wholly implausible period of fifteen seconds respondent argues for.

Indeed, Respondent's whole ability to claim the trial evidence "demonstrated beyond a reasonable doubt that petitioner had sufficient time to participate in the murder and easily make it to the dining room to be the first in line for lunch," (Resp. Brief 31-32), is due solely to the inaction of trial counsel. Trial counsel neglected to use evidence in his possession to cross-examine or rebut the guards' testimony that the emergency radio call regarding the stabbing was not broadcast until 10 or 20 minutes after the murder.[7]

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[7] "Sgt. Flowers testified that approximately 5 to 10 minutes had elapsed from the time he first saw Stewart throw the steaming liquid in Dade's face until he met Capt. Eberle near base control." (Resp. Brief 3.) "Capt. Eberle stated that he radioed for help 5 to 10 minutes after first being informed [by Sgt. Flowers] that a disturbance had occurred." (Resp. Brief 5.)

The officers' own reports show that this testimony is wildly exaggerated. In his inter-office communication written the day of the murder, Roger Flowers said that he saw Stewart cross over from two walk to one walk at approximately 11:55 a.m.; Capt. Eberle wrote in his report that same day that he saw Roger Flowers with Rodney Stewart in his custody at approximately 11:55 a.m. Robert Faherty and other officers wrote in their reports that they responded to the distress call at 12:00 noon. (Exhibits 29, 31) The objective evidence indicates that only about 5 minutes lapsed between the time when Roger Flowers opened one walk and the time when dining room guards responded to the emergency call.[8] During this five-minute interval, Dade was attacked, Flowers apprehended Stewart, and the other two perpetrators fled – while Schlup, in sight of Lt. Robert Faherty, walked to the lunchroom ahead of all the other inmates.[9]

Because guards were posted at several points en route to the dining room, it would have been impossible for Mr. Schlup to run to the head of the line without

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[8] Dade was stabbed in a maximum security housing unit in which there were more than half a dozen corrections officers, two telephones and two clerks. Respondent's theory that it took ten to twenty-one minutes for anyone to call for help is simply not plausible.

[9] Schlup's position at the head of the line is probative of his innocence. Although respondent states that "after all the [Walk 2] inmates stepped out of their cells, [Flowers] proceeded to release the inmates on Walk 1," (Resp. Brief 3), Flowers actually waited and "watched all the inmates go from two walk except two or three or four" before moving over to the one walk master lever. (Trial tr. 267).

being seen. Contrary to respondent's suggestion, petitioner need not account for "the fact that O'Neal was able to slip past the guards responding to the murder from the dining room unnoticed." (Resp. Brief 32-33). The evidence at trial was that O'Neal was noticed by at least two guards, Dan Bower (Trial tr. 181) and Larry Farris (Trial tr. 320), as he was running to the dining room. Because of O'Neal's suspicious behavior and the blood on his clothes,[10] Farris turned and followed him into the dining room. (Trial tr. 325-26) Furthermore, when O'Neal was running to the dining room, all of the guards had left their posts and were running in the direction of the housing unit. When Mr. Schlup walked to the dining room, the guards were standing at their posts.

Mr. Schlup has consistently asserted his innocence since the day that Arthur Dade was killed, when he gave a statement that is remarkably consistent with the evidence he has long asked his attorneys to investigate and present to the courts. (Exhibit 18). At his own sentencing hearing, he referred to Officer Faherty as a key witness in his defense. (Trial Tr. 690). In every pro se petition for relief, Mr. Schlup has named the witnesses who told prison investigators that they saw the crime, and he has named the actual participants in the crime. Virtually every surviving occupant of housing unit five swears that Mr. Schlup was not even present at the stabbing of Arthur Dade. (Pet. Brief, Appendix 1). Their

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[10] Although respondent correctly points out that O'Neal sustained a large laceration on his hand after breaking the glass to dispose of the murder weapon, laboratory reports revealed the presence of Arthur Dade's blood on his clothing (J.A. 104-05).

testimony is corroborated by a video tape supporting Mr. Schlup's defense of alibi and by laboratory tests which revealed no trace of blood on Schlup's clothing. The substantial body of evidence that Schlup tendered in support of his claim of actual innocence is far from "commonplace" (Resp. Brief 40).

CONCLUSION

The case for Mr. Schlup's innocence is truly exceptional; it at least warrants a hearing. The judgment of the United States Court of Appeals for the Eighth Circuit summarily rejecting it should be reversed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1993

LLOYD EUGENE SCHLUP, JR.,

Petitioner,

—v.—

PAUL DELO, Superintendent,
Potosi Correctional Center,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AMICUS CURIAE OF FIVE INNOCENT FORMER DEATH ROW INMATES & CENTURION MINISTRIES IN SUPPORT OF PETITONER

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No. 93-7901

IN THE
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LLOYD EUGENE SCHLUP, JR.,

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Potosi Correctional Center,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF AMICUS CURIAE OF FIVE INNOCENT FORMER DEATH ROW INMATES & CENTURION MINISTRIES IN SUPPORT OF PETITIONER

INTEREST OF AMICI

The *amici* submitting this brief are five ordinary citizens who were wrongly convicted of murder and sentenced to death. They are joined by a national organization dedicated to the investigation of prisoners' claims of innocence.[1]

Amici's interest in this case is simple: to remind the Court that the criminal justice system is a complex system run by human beings. Like all such institutions it is subject to failures whose precise mechanisms cannot easily be predicted in advance, but whose consequences are entirely foreseeable. In the case of condemned prisoners, the consequence of a breakdown of the constitutional safeguards that ordinarily validate a conviction can easily be a wrongful execution. The real-world circumstances of *amici's* cases are merely illustrative of errors -- whether made in good faith or otherwise -- that can cause the criminal justice

[1] The parties have consented to the filing of this amicus brief.

system to reach unjust outcomes, with potentially fatal results. As it considers the design of the safety valve that is to guard against this threat, we urge the Court to respond with a legal standard that is sufficiently pragmatic to respond to the practicalities of the situations in which people like those submitting this brief found themselves -- and others like them will find themselves in the future.

Randall Dale Adams is a resident of Ohio. In May, 1977, Mr. Adams was wrongly convicted and sentenced to death for the murder of Dallas, Texas police officer Robert Wood. Mr. Adams came within 72 hours of execution before a stay was entered. This Court later vacated his death sentence. ***Adams v. Texas***, 448 U.S. 38 (1980). Mr. Adams thereafter remained in prison for another decade before his innocence was established by volunteer counsel and a film maker, Errol Morris. Their efforts finally proved that Mr. Adams had been framed by the prosecution's knowing use of false evidence. He was released from prison in March, 1989.

Kirk Bloodsworth is a resident of Maryland. In 1984, he was wrongly convicted on the basis of several eye-witnesses of the murder, rape and first degree sexual offense of 9-year-old Dawn Hamilton, and sentenced to death. After these convictions were overturned because of the prosecution's failure to disclose exculpatory investigator reports that implicated another suspect, ***Bloodsworth v. State***, 512 A.2d 1056 (Md. 1986), Mr. Bloodsworth was again tried and convicted for these crimes and given three consecutive life sentences. ***Bloodsworth v. State***, 543 A.2d 382 (Md.App. 1988). After spending almost nine years in prison, Mr. Bloodsworth was released after sophisticated DNA testing showed that he could not be the individual who assaulted the victim.

Clarence Lee Brandley, an African-American resident of Texas, was wrongly convicted of capital murder and sentenced to death in January, 1981 for the death of sixteen-year-old Cheryl Ferguson, a white female. ***Brandley v. State***, 691 S.W.2d 699 (Tex.Cr.App. 1985). After years of

investigation, Brandley's attorneys and investigators showed that the conviction resulted from state prosecutors' suppression of material exculpatory evidence and state investigators' use of fundamentally unfair and racially-biased investigation procedures. In 1989, his conviction was overturned and he was released from prison. ***Ex Parte Brandley***, 781 S.W.2d 886 (Tex.Cr.App. 1989).

Joseph Green Brown is a resident of Maryland. In 1974, he was wrongly convicted of rape, robbery and capital murder and sentenced to death in Florida largely on the basis of one witness. ***Brown v. State***, 381 So.2d 690 (Fla. 1980). After he had come within 15 hours of execution, he and his attorneys showed that his conviction was based largely upon testimony that was known by the prosecutor to be false. ***Brown v. Wainwright***, 785 F.2d 1457 (11th Cir. 1986). Mr. Brown was released from prison in 1987.

Walter McMillian is an African-American resident of Alabama. After a perfunctory two-day trial in

1988, he was wrongly convicted and sentenced to death for the murder of Rhonda Morrison, a white woman. As a result of four years of determined investigation by volunteer counsel, several new credible defense witnesses were located and the three essential state witnesses admitted that their trial testimony was false and had been procured by state investigators through previously undisclosed promises of lenient treatment and reward money. In 1993, Mr. McMillian was released from prison after state officials conceded his innocence. ***McMillian v. State***, 616 So.2d 933 (Ala.Cr.App. 1993).

Centurion Ministries is a non-profit organization headquartered in Princeton, New Jersey. Its purpose is to provide investigative resources to innocent citizens who have been wrongly convicted and imprisoned. Since its founding in 1983, Centurion Ministries has devoted thousands of hours of investigative resources to cases throughout the country and has won the release from prison of a dozen innocent men and women.

Randall Dale Adams, Kirk Bloodsworth, Clarence Lee Brandley, Joseph Green Brown, Walter McMillian, and Centurion Ministries are uniquely familiar with the adversities and travails a wrongly-convicted citizen, especially one on Death Row, faces when he or she attempts to demonstrate his or her innocence in post-conviction proceedings.

SUMMARY OF ARGUMENT

The purpose of this Court's miscarriage of justice doctrine is straightforward: to protect legitimate finality interests, while giving meaning to the promise that in appropriate cases -- notably cases in which a constitutional violation has contributed to the conviction of a person who is actually innocent -- finality principles "yield to the imperative of a fundamentally unjust incarceration," ***Engle v. Issac***, 456 U.S. 107, 135 (1982).

Justice Powell's plurality opinion in ***Kuhlmann v. Wilson***, 477 U.S. 436 (1986) took a commonsense approach to the problem. He wrote that a court considering

a miscarriage of justice argument must consider all the evidence bearing on guilt now available, and determine whether there is a fair probability that, if fully informed, the original trier of fact would have entertained a reasonable doubt as to guilt. *Id.*, at 455 n.17. This standard accomplishes that which the miscarriage of justice doctrine was designed to do: it subordinates otherwise valid finality interests and allows for consideration of procedurally forfeited constitutional challenges to a conviction upon a showing of innocence that would likely have prevailed at trial.

Mr. Schlup's attorneys will surely set forth the legal reasons why the *Kuhlmann* test ought to be retained. Our focus is elsewhere. We explain why that test is the only meaningful one to apply in light of the realities facing the wrongly condemned. Miscarriages of justice do happen; in the real world, the task of demonstrating innocence after conviction is a daunting -- almost overwhelming -- enterprise. The Court would drain any practical meaning

from the promise of ultimate fairness that undergirds the miscarriage of justice doctrine if it were to adopt a legal standard more rigid than the one set forth in *Kuhlmann*.

ARGUMENT

I. Convicting The Innocent Is Easier Than Clearing Them

A. *A Sketch of the Problem*

It is not the premise of the miscarriage doctrine that the system is incapable of accuracy but rather that it is capable of error. The very phase "miscarriage of justice" was used by Felix Frankfurter in the closing chapter of his careful study of Sacco and Vanzetti to describe one of those "striking instances in which the machinery of the criminal law worked injustice which was later corrected,"[2] and from which [Justice] Frankfurter -- who was then "[s]peaking from a considerable experience as a prosecuting officer, whose special task for a time it was to sustain on

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[2] FELIX FRANKFURTER, THE CASE OF SACCO AND VANZETTI, 108 (1927).

appeal convictions for the Government"[3] -- drew the final conclusion of his book:

> "[These instances] in no wise imply an attempt to undermine the necessary safeguards of society against crime. . . . Rather do they reveal confidence in our institutions and their capacity to rectify errors. They also serve to warn against too marked an assumption that, because ordinarily the criminal machinery affords ample safeguards against perversions of justice, a situation may not arise where extraordinary circumstances have deflected the operation of the normal procedure."[4]

"We cannot know how many mistakes are literally buried."[5] But we do know that "the danger of wrongful execution is chillingly real. Whether one gains insight from scholarly studies, current judicial proceedings,

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[3] *Id.*, at 104.

[4] *Id.*, at 110.

[5] Vivian Berger, *Herrera v. Collins: The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere*, 35 Wm. & Mary. L.Rev. 943, 1008 (1994).

or by experiencing the intensity of community pressures to convict someone -- anyone -- of these atrocious crimes, it is difficult to deny that there is a special danger of factual error in capital cases."[6]

Evidence of innocence in those cases often tends to emerge only at a relatively late stage. Because of the special pressures capital litigation visits upon all actors in the criminal justice system, "it is often only after the passage of time that witnesses -- whether law enforcement officers, prosecutors no longer in office, or prisoners released from custody -- are willing to come forward."[7] Moreover, as Mr. Schlup's case itself certainly illustrates, the poor quality of legal representation too often seen in capital cases "tends to improve somewhat as a prisoner moves through the system, since the insufficiency of legal resources results in a system of triage that generally finds the most

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[6] Eric M. Freedman, *Innocence, Federalism and the Capital Jury*, 18 N.Y.U. Rev. L. & Soc. Change 315, 316 (1990-91) (footnotes omitted).

[7] *Id.* at 316 n.7.

qualified lawyers concentrating their efforts on those defendants closest to execution."[8]

The combined effect of these factors is that whether evidence of innocence emerges earlier or later during the course of post-conviction proceedings is frequently dependent upon fortuitous circumstances that bear no relationship to the justice of executing the prisoner.

As the cases of each of the individual *amici* so vividly demonstrate, convicting an innocent person is less difficult in practice than in theory. A prosecutor's decision to withhold a uniquely exculpatory piece of evidence, his or her presentation of a dishonest witness or misleading exhibit, the testimony from an earnest but mistaken eyewitness, or defense counsel's failure to conduct an adequate investigation, each can undetectably subvert the trial process and can seal an innocent citizen's fate.

But subsequent efforts to uncover such crucial

[8] *Id. See also* Thurgood Marshall, *Remarks on the Death Penalty made at the Judicial Conference of the Second Circuit*, 86 Colum. L. Rev. 1 (1986).

deadly flaws usually consume years, hundreds upon hundreds of hours of reinvestigation, and the expenditure of considerable resources -- which must be scrounged from somewhere, meaning, practically speaking, contributed by *pro bono* counsel or some nonprofit agency that is already overwhelmed by other imperative demands.[9]

A miscarriage of justice doctrine that is true to its name will recognize these factors and not demand a showing that even a truly innocent person will, realistically, be unable to make.

B. *The Details of the Picture*

1. Justice Can -- and Does -- Miscarry in A Variety of Ways

The simple fact is that innocent citizens can be, and are, wrongly convicted of capital crimes today. The experiences of *amici* demonstrate just a few of the possible causes: dishonest police investigators, con-artist informants,

[9] *See generally* Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 Am. U. L. Rev. 1, 79-92 (1990)(herein "ABA Task Force Report").

unscrupulous prosecutors, or their own indolent counsel.

a. The Dishonest Investigator

Mr. Brandley was railroaded by a state investigator who chose repeatedly to ignore evidence that incriminated a white suspect. The investigator instead insisted that the entire investigation be directed toward building a case against Mr. Brandley.[10] Leads inculpating someone other than Mr. Brandley, such as the presence of a caucasian pubic hair on the victim's body, were disregarded. This investigator also intimidated witnesses, and even threatened to kill one, to obtain testimony consistent with his theory of the case.

In part, this dogged determination to "get" Mr. Brandley was driven by racism. As one witness later testified, Mr. Brandley was charged with the crime after it was determined "that 'the nigger' . . . was big enough to have committed the crime; therefore 'the nigger was

[10] ***Ex parte Brandley***, 781 S.W.2d 886, 890 (Tex.Cr.App. 1989).

elected.'"[11]

An overzealous, dishonest sheriff's investigator was similarly responsible for framing Jerry Banks. Banks, then a happily married young African-American father of three, was twice convicted and death-sentenced.[12] While out hunting one day, he came upon the bodies of a white high school band instructor and one of the instructor's former female students. As would any good citizen, Banks immediately notified the police. This act of civic duty led to his being charged with the murders.

No evidence or motive linked Banks to the crime until an investigator planted several shotgun shells that matched Banks' old shotgun near the scene of the crime. This evidence proved sufficiently persuasive to twice induce juries to convict Banks for the murders and to

[11] ***Id.***, at 890.

[12] ***Banks v. State***, 268 S.E.2d 630 (Ga. 1980). Banks' first conviction was overturned because the prosecution withheld exculpatory material. ***See Banks v. State***, 218 S.E.2d 851 (Ga. 1975).

sentence him to death.[13] Only after years of dogged effort by lawyers convinced of their client's innocence did he achieve judicial vindication.[14]

The appalling tactics utilized in ***Banks*** and ***Brandley*** are not aberrations. In the past year, several New York State patrol evidence technicians have been convicted of manufacturing evidence and testifying falsely in scores of trials.[15] One of these officers, David Harding, told investigators that he was encouraged by superiors to falsify evidence and that other police investigators did as he did. These assertions rang true to Gerald Arenberg, a retired police officer and Executive Director, National Chiefs of

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[13] At both trials, Banks was represented by an attorney who was later disbarred. *See* ***Banks v. State***, 268 S.E.2d at 631. Counsel's fee was a retainer of $10, "a kettle of fish and some collard greens." Brenda Mooney, *Banks' Release Has Kids 'Jumping Like Squirrels,'* **Atlanta Constitution**, December 24, 1980 at p. 1.

[14] ***Banks v. State***, *supra*. Just three months after his release, Mr. Banks committed suicide.

[15] *Officer Harding*, **CBS 60 Minutes**, March 28, 1993 at 12-16; *Former State Trooper Explains Ways He Fabricated Evidence*, **New York Times**, April 17, 1993 at B-5; *Ex-Trooper Gets Prison for Faking Evidence*, **New York Times**, June 12, 1993 at L-26.

Police, who is regularly informed of reports of faked evidence. He recently explained:

> What you learn in police school is to obey the law, the constitutional rights of citizens. Then you go out and start riding with older officers who are more experienced. And they say, 'Well listen, what they taught you in police school, forget about it because this is the real world. Now in order for us to make cases, we're going to have to do -- take some shortcuts.'[16]

Moreover, a commission studying corruption in the New York City Police Department has identified similar problems. "Falsifying Department records and making false statements is not uncommon among certain police officers, even among those who do not engage in other kinds of misconduct."[17]

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[16] *Id.* at 16.

[17] Interim Report and Principal Recommendations of Commission to Investigate Allegations of Police Corruption and Anti-Corruption Procedures of The New York City Police Department, December 27, 1993 at 10 (herein "Mollen Report").

b. The Con-man Informant

It's hardly news that prosecutors often rely heavily upon the testimony of a "snitch" or informant to establish an essential portion of the state's case. Sometimes, this evidence is later shown to be worthless, as the informant was willing to say anything to gain favor in his own case. This Court has announced constitutional rules that are designed to minimize this risk,[18] but the rules are sometimes ignored or prove ineffective.[19]

Mr. Adams certainly understands this point; the most damaging evidence against him came from informant David Harris who later admitted that his trial testimony inculpating Mr. Adams was untruthful, and had been given to secure a deal in his own case.[20]

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[18] *See Napue v. Illinois*, 360 U.S. 264 (1959); *Giglio v. United States*, 405 U.S. 150 (1972).

[19] *See, e.g., Brown v. Wainwright*, 785 F.2d. 1457 (11th Cir. 1986) (prisoner sentenced to death in trial at which prosecutor knowingly argued falsely to jury that no deal had been struck for testimony of key witness).

[20] *Ex parte Adams*, 768 S.W.2d 281 (Tex.Cr.App. 1989).

Mr. McMillian was similarly victimized. There, the state's most essential witness avoided capital murder charges himself by giving false evidence to convict Mr. McMillian; two other state witnesses were paid thousands of dollars for their false incriminating testimony.[21]

Over-reliance upon snitch testimony in Los Angeles has raised grave doubts about the credibility of numerous capital convictions there. In 1989, Leslie White, an inmate at the L.A. County Jail, showed authorities -- and reporters -- how he could easily gather enough information about a case during a few minutes on the telephone to concoct a "confession" that prosecutors could later use to obtain convictions.[22] White learned his trade during his many years of incarceration -- he had been in and out of prison thirty times since he was nine years old. In many of

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[21] *McMillian v. State*, *supra*, at 946.

[22] Mark Curriden, *No Honor Among Thieves*, ABA Journal, June, 1989, at 52.

his own cases, he was released early by making deals with prosecutors for testimony.

As a result of White's disclosures, the LA County District Attorney's office had to review more than 200 murder cases in which tainted informants provided important testimony. Sixteen of these cases are capital cases. Prosecutors have since confessed error in at least two murder cases because of unreliable informant testimony.[23]

Such use of informants, who have everything to gain and little to lose by telling the police what they wish to hear, is growing and is lessening the integrity of the system. A recent report notes that various governmental agencies have paid crooks upwards of $40 million to help solve crime.[24] Information and evidence plied by dollars and deals is more likely to be false as many informants "are

[23] Ted Rohrlich, *D.A. Admits Murder Trial Was Unfair*, **Los Angeles Times**, August 2, 1990, p. A1. Of course, given the tendency of governmental officials to protect their convictions -- especially their capital convictions -- at all costs, *see* 29-30 *infra*, defense efforts may well eventually reveal that some of the other convictions were also wrongful.

[24] *The Informers*, **CBS 60 Minutes**, March 28, 1993 at 1.

pathological liars."[25]

c. The Unscrupulous Prosecutor

While most prosecutors throughout the country steadfastly comply with constitutional and ethical standards while enforcing the law, some do not. The temptation to disobey the law is strongest in capital cases. Failure to win a conviction or death sentence in a widely publicized case can stir public outrage, and harm a promising career. *Amici* have seen prosecutors withhold evidence or permit witnesses to testify falsely to insure convictions.

In Mr. Adams' case, the District Attorney lied to the trial court about the status of a crucial state's witness and failed to disclose to the defense evidence that would have shown that this witness committed perjury.[26] In Mr. Brandley's case, the prosecutor presented evidence that he

[25] *Id.* at 3.

[26] *See Ex parte Adams*, 768 S.W.2d at 285-87.

knew was not truthful.[27]

Again, these cases are illustrative, not unique. James Joseph Richardson's capital prosecution was plagued by similar problems. Nearly 22 years after being convicted for the poisoning deaths of his seven children, Mr. Richardson was released from prison when Attorney General Janet Reno, then serving as a special prosecutor appointed by the Governor, found that the trial prosecutor withheld crucial evidence that could have resulted in acquittal, allowed witnesses to lie, and made no attempt to correct their testimony.[28]

d. The Neglectful Defense Attorney

A defendant's own attorney can fail to act and thus not uncover and present evidence showing that the government is prosecuting the wrong person. Much as Mr. Schlup asserts, Donald Griffin told his attorney during their

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[27] ***Ex Parte Brandley***, 781 S.W.2d at 893.

[28] *See* Curriden, *supra* note 22, at 54. ***See also McDowell v. Dixon***, 858 F.2d 945 (4th Cir. 1988)(prosecutor failed to disclose surviving victim's initial description of assailant as white male; defendant was African-American).

first meeting that he was not guilty and provided several alibi witnesses. Neither his first nor second attorney made any effort whatsoever to speak to any of these witnesses except for Mr. Griffin's mother. ***Griffin v. Warden***, 970 F.2d 1355, 1356-57 (4th Cir. 1992). After trial counsel presented no alibi defense, the jury convicted Griffin of armed robbery on the basis of two eyewitnesses. With new counsel in post-conviction proceedings, Griffin later showed that several credible witnesses had been available to provide an alibi. The Fourth Circuit reversed Griffin's conviction after finding its confidence in Griffin's guilt "very much undermined." ***Id***.

In light of existing documentation of the inadequacies of many capital defense counsel,[29] it is not surprising that similar failings have come to light in other capital cases,[30] including ones in which the judicial system

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[29] *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.Rev. 1835 (1994); ABA Task Force Report, *supra* note 9.

[30] ***Martinez-Macias v. Collins***, 979 F.2d 1067 (5th Cir. 1992)("We are left with the firm conviction that Macias was denied his constitutional right to adequate counsel in a capital case in which actual innocence was a close question. The state paid defense

has initially denied relief because the evidence required to satisfy the prejudice prong of ***Strickland v. Washington***, 466 U.S. 668 (1984) was slow to emerge.

2. The Revelation of Miscarriages of Justice is Often Fortuitous

In the wake of cases like *amici's* -- where innocence is recognized and release from prison celebrated -- it is often heard that such vindication "proves the system worked." But more careful examination of the circumstances that ultimately led to relief shows that vindication depends upon an uncommon confluence of resources, time, and luck. If the Court's miscarriage standard is to achieve its purpose, it must take into account these harsh realities that frequently impede the revelation of innocence.

a. <u>The Problem of Resources</u>

Few indigent inmates possess the resources necessary to marshall a comprehensive reinvestigation of their cases, and many states still fail to provide adequate,

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counsel $11.84 per hour. Unfortunately, the justice system got only what it paid for").

compensated counsel for post-conviction proceedings.[31] Although the situation is theoretically better on federal habeas corpus,[32] Mr. Schlup's case demonstrates that this is not always true in the real world, especially in capital cases.

For understandable reasons, most notably the extraordinary investment of time and effort required to provide effective representation, many lawyers refuse to handle capital cases. "Taking on such a case means making a commitment to the full legal and factual evaluation of two very different proceedings (guilt and sentencing) in circumstances where the client is likely to be the subject of intense public hostility, where the state has devoted maximum resources to the prosecution, and where one must

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[31] *See* **Judicial Conference of the United States *Ad Hoc* Committee On Federal Habeas Corpus in Capital Cases, Committee Report and Proposal (August 23, 1989)(herein "Powell Committee"); ABA Task Force Report, *supra*, note 6.**

[32] **Unlike numerous states, Congress has provided for the appointment of counsel and for the availability of investigative resources for indigent condemned inmates who seek review of their cases pursuant to 28 U.S.C. § 2254. *See* 21 U.S.C. § 848 (1988).**

endure the draining effects of one's personal responsibility for the outcome."[33]

The effort that was required to show Mr. McMillian's innocence is not atypical. As his lead attorney told the Senate Judiciary Committee recently:

> The ease with which Mr. McMillian was convicted of capital murder and sentenced to death for a crime he did not commit, contrasted with the enormous difficulties we encountered in establishing his innocence and achieving his release, say much about the criminal justice system and innocence and the death penalty. *That it took four and a half years of litigation and thousands of hours of investigation* to free Mr. McMillian after wrongly convicting him in two days shows us that there are disturbing problems which must be corrected within our criminal justice system.[34]

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[33] *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 Rec. Assoc. Bar City N.Y. 852, 854 (1989).

[34] Hearing on Innocence And The Death Penalty, Statement of Bryan A. Stevenson before the U.S. Senate Committee on the Judiciary, April 1, 1993 at 11 (emphasis added).

Counsel for Jerry Banks similarly expended thousands of hours of uncompensated time before they identified the witnesses who finally could show that the State had convicted the wrong man. One of his attorneys commented after Banks was freed that "no single lawyer could have adequately handled Banks' case, which involved 4000 hours of legal work. He said there should be a board of approved attorneys to handle death penalty cases."[35] The records in Mr. Adams' and Mr. Brandley's cases show that similar amounts of time and out-of-pocket expenses were required to vindicate their innocence.

There is a limited number of lawyers in the country who are willing to donate their time and the considerable resources required to demonstrate the factual unsoundness of a state conviction that arrives in federal court backed by apparently plausible evidence. Hence, the fact that, as in Mr. Schlup's case, a competent lawyer, who

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[35] Mooney, *supra* note 13 at 3-A.

collects the evidence of innocence, arrives later rather than sooner is neither surprising nor evidence of bad faith on the part of the prisoner. The inmate may well have been hounding volunteer organizations like the Centurion Ministries for help. The fact that he got it only belatedly casts no doubt on his claim of innocence, but rather is a stark reflection of his difficulties in vindicating that claim. A miscarriage of justice doctrine that would punish him for these circumstances beyond his control is hardly worthy of the name.[36]

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[36] It is no secret that many law enforcement officials are unwilling to aid investigations initiated by prisoners even when they know that the case "has problems." As the Executive Director of the National Association of Police Chiefs reminded us recently, "as police officers, we protect each other. We're a very thin blue line. It's you against us, and so we're not likely to turn in a brother officer," **CBS 60 Minutes**, *supra* note 15 at 16. The Mollen Commission reached similar conclusions:

> The code of silence influences a vast number of police officers, even those who are otherwise honest. Officers who violate the code of silence often face severe consequences. They are ostracized and harassed, become targets of complaints and even physical threats; and fear that they will be left on their own when they most need help on the street. Consequently, many honest officers take no action to stop the wrongdoing they know or suspect is taking place around them. The code of silence also often extends to superiors, who seek to protect their subordinates from charges of misconduct and their own careers from the taint of scandal.

Mollen Report at 6.

Again, the situation is particularly serious in capital cases because that is the context in which prosecutors and law enforcement officers most stubbornly refuse to concede error, even when there is no question that the wrong person has been convicted.[37] In Mr. Adams' and Mr. McMillian's cases, state prosecutors vigorously defended the guilty verdicts long after it became apparent that their key witnesses had lied and exculpatory information had been suppressed. In Mr. Brandley's case, even after it became clear that the State's case was fundamentally flawed and based upon perjured testimony and the suppression of much exculpatory material, the State fought hard to keep its judgment and for its right to Mr. Brandley's execution. To

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[37] Indeed, in a recent Pennsylvania capital case, prosecutors went so far as to wrongly accuse a fellow law enforcement officer -- who gave truthful testimony consistent with the defense innocence theory -- of fabricating evidence and committing perjury so that the State could win a conviction. ***Commonwealth v. Smith***, 615 A.2d 321 (Pa. 1992).

our knowledge, none of those officials have yet declared that they convicted the wrong man.

b. The Role of Luck

While each of the individual *amici* literally owes his life to his post-conviction attorneys, who personify the very finest traditions of the Bar, and to their volunteer investigators, some might still remain in prison or have by now been wrongly executed had it not been for sheer luck.

In Mr. Adams' case, it is now well known that despite counsel's best efforts, some of the crucial prosecution documents which showed perjury and suppression of exculpatory evidence were first discovered by an independent movie producer, Errol Morris. While law enforcement officials ignored repeatedly their duty to provide this information to the court and counsel, they gave it to journalist Morris. And it was only because of his pursuit of the story, in combination with counsel's independent efforts, that the truth of Mr. Adams' wrongful

conviction was fully brought to light.[38] Thus, a critical factor was the decision of Morris to interview residents of Death Row in Texas at that particular time.

An important lesson to be drawn from *amici's* cases is that, in the real world, the timing of the emergence of the evidence that enables innocence to be vindicated is often fortuitous. For example, no police officer, or prosecutor, or defense attorney in the New York state criminal justice system detected investigator Harding's shenanigans; the fact that he and other officers were fabricating evidence was learned only when he sought employment with the CIA, and told his interviewers that he would be willing to violate the law for the good of the

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[38] Indeed, often the most critical factor in determining whether an inmate's claim of innocence will succeed is whether he is able to draw the interest of the press -- but doing so ordinarily requires having a competent lawyer. *See* Freedman, supra note 6, at 316 n.5, 321. For example, media attention was vital in helping to insure the emergence of the truth in Mr. Brandley's case. *See, e.g.*, NICK DAVIES, WHITE LIES: RAPE, MURDER AND JUSTICE TEXAS STYLE (1991). This attention came into existence only after counsel made the press aware of the injustice.

country.[39]

Other non-capital cases make this point as well. Alberto Ramos was convicted in New York of raping a 5-year-old girl at a day care center where he was employed. The conviction was based "essentially on the testimony of [the child]."[40] Ramos' defense was that he never raped the child; the child's doctor testified that the child described an explicit sex act that the doctor believed no child of that age could know about without having experienced. Ramos was convicted, was given the maximum sentence, and his conviction was affirmed on appeal.

Through new counsel, Ramos sought post-conviction relief. During the pendency of these proceedings, Ramos received a tip that allowed him to demonstrate that he had been wrongly convicted. Shortly after his conviction, the child's parents filed a suit against the day care center.

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[39] CBS 60 Minutes, *supra* note 15, at 13.

[40] ***People v. Ramos***, Supreme Court of New York, Bronx County, Part 21 No. 3280/84 (Order vacating conviction) at p. 1.

Pursuant to their investigation, they learned that day care center records and other documents showed that the child often masturbated in class, simulated sexual intercourse to her peers, and had alleged falsely that a 5 year old boy had touched her just prior to her complaint against Ramos -- and that these files had been in the possession of the prosecutor at the time of trial. The parents' investigator turned this information over to Ramos' counsel.

But for this unrelated lawsuit and the tip from the investigator, Ramos might well have never learned that at the time of his trial the prosecutor possessed evidence that cast very strong doubt on the veracity of the young complainant. In dismissing the conviction, the trial court wrote that this sort of case "require[s] great care and balance on the part of the District Attorney." Order at 8. The Court concluded:

> The greatest crime of all in a civilized society is an unjust conviction. It is truly a scandal which reflects unfavorably on all participants in the criminal justice system. Ramos -- a first

> offender -- was sentenced to the maximum at the same time that the sentencing judge called on the Legislature to prescribe a harsher term. It is no wonder that Ramos, in rage, is said to have cried out, "Kill me now, I want to die."

Id, at 9. Shortly thereafter, Ramos was discharged from custody, a free man.[41]

In a recent Georgia drug case, Rusty Strickland spent six months in jail for possession of a white substance that turned out to be soap.[42] At his arrest and at his preliminary hearing, he insisted he was innocent, and even begged courtroom personnel to smell the evidence. None would. A chemist from the crime lab testified at the hearing that testing showed the substance to be cocaine.

On the eve of trial, the prosecutor learned that the chemist -- an essential witness -- was on vacation,

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[41] Marie Newman, *Man Freed After Serving 7 Years for Rape*, New York Times, June 3, 1992 at B1.

[42] Trisha Renaud, *Open and Shut, and Wrong*, Fulton Daily Law Report, September 28, 1992 at p. 1.

and sought new testing and another expert. This new expert determined the substance was soap and the charges were dismissed. But for the first chemist's vacation schedule, Strickland might well today be under a long mandatory sentence for drug trafficking.

Neither of these defendants, nor any of those jailed as a result of Harding's misconduct, had any control whatsoever over the timing of the revelations of governmental misconduct that led to their delayed acquittals. But they were all the victims of miscarriages of justice, and as worthy of those acquittals as they would have been if the evidence had emerged months before.

II. *Kuhlmann* Provides the Appropriate Miscarriage of Justice Test

Justice Powell's *Kuhlmann* miscarriage standard -- which has since been adopted by the Court -- strikes a fair balance between the concerns of fairness and finality. It recognizes that prisoners who advance colorable showings of innocence hold greater entitlement to judicial

review than do obviously guilty inmates. He wrote:

> The prisoner may have a vital interest in having a second chance to test the fundamental justice of his incarceration. Even where, as here, the many judges who have reviewed the prisoner's claims in several proceedings provided by the State and on his first petition for federal habeas corpus have determined that his trial was free from constitutional error, a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he is incarcerated.[43]

It was thus appropriate that the Court in ***Sawyer v. Whitley***, 505 U.S. ___, 112 S.Ct. 2514, 2519 n.5, 120 L.Ed.2d 269, 280 (1992), reiterated that ***Kuhlmann*** supplied the controlling rule for determining miscarriages of justice in the guilt/innocence context. Mr. Schlup's attorneys will doubtless argue in greater detail that the Eighth Circuit's decision to apply the ***Sawyer*** capital penalty phase standard

[43] 477 U.S. at 452.

to guilt phase claims is simply wrong on the law. More critically, it is wrong because this misapplication defeats the very purpose of having a miscarriage of justice doctrine concerned with "actual innocence." The idea behind that doctrine is that at least where the wrong person has been convicted, "finality principles must yield to the imperative of a fundamentally unjust incarceration," ***Engle v. Issac***, *supra* at 135. If the doctrine fails to reach persons that, upon all of the now-available evidence, would fairly probably be acquitted at a constitutional trial -- the ***Kuhlmann*** standard -- the State would be permitted to receive the unjust benefit of a constitutional error which contributed to someone who ought never to have been convicted.[44]

This is the very result the miscarriage of justice doctrine is designed to avoid. For the State to enjoy that benefit is particularly unfair in a world in which, as we

[44] Of course, the ability of a prisoner to satisfy the ***Kuhlmann*** miscarriage standard does not assure that he or she will win relief; it only obtains consideration of the underlying constitutional claim(s) whose elements and prejudicial nature must still be demonstrated.

have shown, the timing of the emergence of evidence of innocence is, at best, fortuitous, and, at worst, under the control of the State itself.

To erect unrealistic barriers to the satisfactory showing of miscarriage will surely result in the punishment of innocent people with no compensating benefit to the justice system. All prisoners, under sentence of death or not, have an incentive to get out, and hence can be counted upon to present claims of innocence as rapidly as possible. But -- in light of the formidable obstacles they usually must overcome -- this presentation may, in perfectly good faith, not occur until after an initial round of federal habeas corpus proceedings.

If the prisoner at that point must meet the draconian test imposed below (that no reasonable juror would find the defendant guilty after considering the unrecanted trial evidence), then, as a practical matter, almost no prisoner will ever meet the test. As we have shown, there are government officials to be found who will

defend an indefensible conviction to the last gasp. That gasp should not be the prisoner's.

CONCLUSION

As *amici* know all too well, we live in an imperfect world, one which includes a criminal justice system that can err in frightening ways. It is unrealistic to believe that all such errors can be eliminated at the source, but, *amici* submit, it is not asking too much to insist that the system take reasonable steps to correct such injustices once they do come to light.

Where a prisoner shows a fair probability that a reasonable factfinder, if fully informed, would have entertained a reasonable doubt as to guilt, then he or she has demonstrated a miscarriage of justice that warrants review of the merits of his or her constitutional claims.

Respectfully submitted,

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AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LLOYD E. SCHLUP, Jr.,

Petitioner,

vs.

PAUL K. DELO, Superintendent,
Potosi Correctional Center,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does the "colorable claim of innocence" standard announced in *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986) control the "fundamental miscarriage of justice" exception to the cause and prejudice test as applied to guilt of the crime?

IN THE

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OCTOBER TERM, 1993

LLOYD E. SCHLUP, Jr.,

Petitioner,

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PAUL K. DELO, Superintendent,
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Respondent.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF RESPONDENT

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of respondent in the above-captioned case. Counsel for Petitioner has effectively refused consent, by failing to grant or explicitly refuse consent. Counsel for Respondent has consented.

In the accompanying brief, *amicus curiae* argues that the "colorable claim" standard of *Kuhlmann* v. *Wilson* does not govern the innocence exception to the cause and prejudice test.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society

to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves efforts to subvert the cause and prejudice test. Subverting this test would lead to more needless habeas litigation. The inevitable delay and waste of resources associated with such litigation is contrary to the interests CJLF was formed to protect.

For the foregoing reasons, *amicus curiae* requests for leave to file its brief.

July, 1994

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LLOYD E. SCHLUP, Jr.,

Petitioner,

vs.

PAUL K. DELO, Superintendent,
Potosi Correctional Center,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

SUMMARY OF FACTS AND CASE

Petitioner was convicted and sentenced to death for the murder of Arthur Dade, a fellow inmate at the Missouri State Penitentiary. Pet. Brief 2. His conviction and sentence were affirmed by the Missouri Supreme Court on direct review. *State* v. *Schlup*, 724 S. W. 2d 236, 237 (Mo. 1987). This Court denied certiorari and his conviction and sentence were upheld in the first round of state and federal habeas corpus. Pet. Brief 7-9.

On his second round of federal habeas corpus, Petitioner claimed that his trial counsel was ineffective in failing to find and utilize evidence of his innocence. Because this was a successive habeas petition, under the rule of *McCleskey* v. *Zant*, 499 U. S. 467 (1991) a federal habeas court could not reach the merits of Schlup's claim unless he satisfied the cause and prejudice test of *Wainwright* v. *Sykes*, 433 U. S. 72 (1977) or made a sufficient showing of his actual innocence of the crime. See *Schlup* v. *Delo*, 11 F. 3d 738, 739 (CA8 1993). The District Court

dismissed Schlup's petition without reaching the merits, finding that he had neither established cause and prejudice nor satisfied the innocence exception.

The Eighth Circuit affirmed. It adopted the cause and prejudice finding of the District Court. Furthermore, applying *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992), the Eighth Circuit held that Schlup did not satisfy the innocence exception to the cause and prejudice test because he had not established by clear and convincing evidence that no reasonable jury would convict him. 11 F. 3d, at 743.

SUMMARY OF ARGUMENT

The "colorable claim" standard of innocence announced by the plurality in *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986) does not control the present case. The colorable claim standard was used by the *Kuhlmann* plurality for a different purpose than its original author intended. The plurality gave little justification for choosing the colorable claim standard. This lack of analysis is consistent with the fact that the primary concern with *Kuhlmann* was limiting the scope of the "ends of justice" exception articulated in *Sanders* v. *United States*, 373 U. S. 1 (1963).

Subsequent decisions do not establish the plurality's authority. Most cases invoking the innocence exception did not even rely on the colorable claim standard. The one case other than *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992) to invoke the colorable claim standard as something other than dicta did so as a statement of historical fact; it did not invoke the *Kuhlmann* standard as a holding that must be followed.

The controlling precedent is provided by *Sawyer* v. *Whitley*, *supra*. The clear and convincing standard was essential to *Sawyer*'s purpose of limiting needless stays. More importantly, the *Sawyer* Court applied the clear and convincing standard to a claim of guilt phase claim of innocence, making the standard controlling for both guilt and penalty phase claims. Thus *Sawyer* controls the present case.

Considerations of *stare decisis* aside, *Sawyer* provides the better standard. Conviction of the innocent is extremely rare, and the *Kuhlmann* standard has not been needed to protect the

innocent. Furthermore, there is a real and continuing risk of abusing habeas corpus to stay executions, something the *Kuhlmann* standard only exacerbates. Finally, the *Kuhlmann* standard is so similar to prejudice that it would subvert the cause and prejudice test.

Sawyer is an appropriate compromise of the costs and benefits raised by the innocence exception to the cause and prejudice test. It takes into account the small likelihood of innocence while checking the potential for abuse in the innocence exception. Finally, it provides a clear signal to the courts and society of the confidence we should have in the validity of convictions.

ARGUMENT

I. *Kuhlmann* v. *Wilson* does not control the present case.

The present case concerns what effect, if any, must be given to the "colorable claim" standard of proof enunciated by a plurality of this Court in *Kuhlmann* v. *Wilson*, 477 U. S. 436, 454 (1986). Petitioner asserts that the court below erred in not applying this standard to the innocence exception to the cause and prejudice test. See Pet. Brief 22. Petitioner is mistaken. The colorable claim standard of *Kuhlmann* should not govern the present case because it lacks precedential value and because it was not designed to be an exception to the cause and prejudice test. Thus the Eighth Circuit was correct in applying the "clear and convincing" standard announced by this Court in *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992).

In *Kuhlmann* v. *Wilson*, *supra*, a plurality of this Court attempted to give meaning to the "ends of justice" excuse to successive petitions first articulated in *Sanders* v. *United States*, 373 U. S. 1 (1963). See 477 U. S., at 444-445. The *Kuhlmann* plurality made two choices. First, it focused the broad, ill-defined phrase "ends of justice" on the narrower, more readily ascertained issue of the prisoner's innocence. See *id.*, at 452. This focus merits much praise and little controversy. No interest is served by punishing the innocent, and our criminal justice system makes strong efforts to prevent this from happening. See *Herrera* v. *Collins*, 122 L. Ed. 2d 203, 215-216, 113 S. Ct. 853,

859-860 (1993). This focus on innocence as an exception to habeas corpus defenses such as abusive or successive writs was thus adopted by a majority of this Court in a series of cases culminating with *Sawyer* v. *Whitley*, *supra*. *Herrera*, *supra*, 122 L. Ed. 2d, at 219, 113 S. Ct., at 862.

The second choice made by the *Kuhlmann* plurality, the necessary standard of innocence a habeas petitioner had to meet, is much more controversial. Its choice of Judge Friendly's "colorable claim of innocence" standard[1] has not received any serious review by this Court until now. Its treatment by this Court in subsequent cases demonstrates that its precedential value is minimal.

A. Kuhlmann.

Kuhlmann v. *Wilson*, 477 U. S. 436 (1986) was this Court's first attempt to clean up the mess left by *Sanders* v. *United States*, 373 U. S. 1 (1963). The *Sanders* Court recognized that the ends of justice could still be invoked by a federal court to hear a successive habeas petition, but left this term undefined. See *id.*, at 16-17. As the circuit courts were showing considerable difficulty in applying *Sanders* in a consistent and principled manner, the *Kuhlmann* plurality sought to clarify what the ends of justice required. 477 U. S., at 445.

The most important decision of the *Kuhlmann* plurality was to limit the "ends of justice" inquiry to actual innocence. An undefined reliance on the abstract justice of a prisoner's cause could allow him a second chance simply because of the nature of his constitutional claim. Cf. *Murray* v. *Carrier*, 477 U. S. 478, 500 (1986) (Stevens, J., concurring in the judgment). The plurality rejected such an approach based on the history of habeas corpus and the legislative intent behind the most recent changes in the habeas corpus statute.

The plurality noted this Court's recent move away from its expansion of the writ. *Kuhlmann*, *supra*, 447 U. S., at 446-447. This retrenchment was driven by a keen understanding of the high costs associated with limitless access to federal habeas

1. See Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970).

review. See *ibid.* A particularly important feature of this reformation was the fact that these restrictions on habeas corpus "created no danger that we were denying a 'safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty.' " *Id.*, at 447 (quoting *Stone* v. *Powell*, 428 U. S. 465, 491-492, n. 31 (1976)).

The focus on innocence was also consistent with broad principles of habeas corpus. Whether expanding or contracting habeas corpus, "the Court has reaffirmed that 'habeas corpus has traditionally been regarded as governed by equitable principles.' " *Id.*, at 447 (quoting *Fay* v. *Noia*, 372 U. S. 391, 438 (1963)).[2] Thus this Court has meant for the writ "to afford relief to those 'persons whom society has grievously wronged' . . . ." *Ibid.* (quoting *Fay*, *supra*, 372 U. S., at 440-441). Whatever these notions may have meant, they did not justify limitless examination of the constitutionality of convictions. "But the Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of a crime is afforded a trial free of constitutional error." *Ibid.*

This last statement is the key to the *Kuhlmann* plurality. Earlier decisions of this Court had placed great weight on the need for federal habeas courts to provide prisoners with an outlet for their constitutional claims. See, *e.g.*, *Fay*, *supra*, 372 U. S., at 433-434. The plurality's acknowledgement that the constitutionality of a conviction did not necessarily decide its fundamental justice continued this Court's move away from its more expansive interpretation in the 1960's and a partial return to the original understanding. See 477 U. S., at 446, 452.

While the plurality went to considerable analytic lengths to narrow the ends of justice to the question of innocence, it chose the standard of innocence in a relatively offhand manner. The only analysis the plurality engaged in before adopting the "colorable claim" standard was noting the innocent prisoner's interest in having his conviction vacated and the State's interest in preserving the finality of its convictions. See *id.*, 477 U. S.,

2. *Fay* v. *Noia* was subsequently overruled on other grounds in *Coleman* v. *Thompson*, 115 L. Ed. 2d 640, 649, 111 S. Ct. 2546, 2565 (1991).

at 452-454. Although this justifies focusing on the prisoner's innocence, it does not identify why a particular standard of innocence should apply. The plurality only gave scant justification for the colorable claim standard after announcing it.

> "As Judge Friendly persuasively argued then, a requirement that the prisoner come forward with a colorable showing of innocence identifies those habeas petitioners who are justified in again seeking relief from their incarceration. We adopt this standard now to effectuate the clear intent of Congress that successive federal habeas review should be granted only in rare cases, but that it should be available when the ends of justice so require." *Id.*, at 454.

This statement is the closest *Kuhlmann* came to an explanation of its standard. Friendly had argued for colorable claim standard as a requirement for *all* habeas petitions, whether initial or successive. See 38 U. Chi. L. Rev., at 160. While the *Kuhlmann* plurality understood this distinction, see 477 U. S., at 454, it did not deal with the implications. There is a substantial difference in the relative interests of the state and prisoners between initial and second habeas petitions. See *McCleskey* v. *Zant*, 499 U. S. 467, 492 (1991). The different interests implicated by the two proceedings must affect the calculus of what standard of proof applies. Cf. *Addington* v. *Texas*, 441 U. S. 418, 423 (1979). Importing Friendly's standard for all petitions into the very different setting of successive or abusive claims only exacerbates the lack of analysis.

It is understandable that the *Kuhlmann* plurality adopted this standard with little analysis. As shown above, the primary focus of the decision was limiting the "ends of justice" from the entirely discretionary *Sanders* standard, to the narrower and more certain inquiry into petitioner's innocence. Since there was no substantial question of the prisoner's guilt, see 477 U. S., at 455, there was no compelling need to focus on a particular standard of innocence; once innocence became the focus, the prisoner (Wilson) was going to lose regardless of the standard applied. Thus, the *Kuhlmann* standard was closer to an afterthought than a fully analyzed rule of law.

B. Subsequent Treatment.

The *Kuhlmann* plurality's colorable claim standard has received no more than cursory treatment in subsequent cases. In *Murray* v. *Carrier*, 477 U. S. 478 (1986), decided the same day, a majority of this Court noted that an exception to the cause and prejudice test for procedurally defaulted claims existed where "a constitutional violation has *probably* resulted in the conviction of one who is actually innocent . . . ." *Id.*, at 496 (emphasis added). No mention of *Kuhlmann* was made and no further explanation was given on this point. As the question of innocence was not addressed by the prisoner or the court below, this Court remanded the case for further consideration in light of the decision. *Id.*, at 497. The language in *Carrier* was subsequently quoted in two capital cases dismissing claims while making no mention of *Kuhlmann*. See *Smith* v. *Murray*, 477 U. S. 527, 537 (1986) (also decided the same day); *Dugger* v. *Adams*, 489 U. S. 401, 412, n. 6 (1989).

The fact that *Kuhlmann* was not mentioned in any of these three cases is particularly damaging to the *Kuhlmann* standard's value as precedent. While, as petitioner notes, these cases were consistent with *Kuhlmann* in focusing on the importance of innocence for the unjust conviction inquiry, see Pet. Brief 24-25, the fact that the *Kuhlmann* standard *was never mentioned*, let alone used in evaluating a claim of innocence, shows its lack of precedential value. In these three cases, the colorable claim standard is conspicuous by its absence. If the *Kuhlmann* standard were authoritative it should have been applied, or at least alluded to in these cases. The fact that *Kuhlmann* was not even mentioned in *Smith*, *Dugger*, and *Carrier* diminishes its value as precedent.

Nor can *Carrier*'s "probably resulted in the conviction of one who is actually innocent" statement be used as a stalking horse for the colorable claim standard. If anything, *Carrier* foreshadows the higher standard of *Sawyer* and not the relatively low *Kuhlmann* standard. "Probably" is defined as "[m]ost likely; presumably." American Heritage Dictionary 1443 (3d ed. 1992). This is closer to the clear and convincing standard articulated in *Sawyer* than *Kuhlmann*'s colorable claim standard.

A majority of this Court did recognize the existence of the *Kuhlmann* standard in *McCleskey* v. *Zant*, 499 U. S. 467, 495 (1991). This does not, however, establish the colorable claim standard as precedent. The issue in *McCleskey* was whether the state had to show the habeas petitioner's deliberate abandonment of a claim before successfully pleading abuse of the writ. *Id.*, at 477. McCleskey answered that question in the negative and imported the *Carrier* cause and prejudice test from procedural default cases into successive/abusive petition cases. *Id.*, at 493. The citation to *Kuhlmann* came about because the *McCleskey* Court recognized a "fundamental miscarriage of justice" exception to the cause and prejudice test it had adopted. *Id.*, at 495. This exception gave meaning to the "otherwise unexplained 'ends of justice' inquiry mandated by *Sanders*." *Ibid.* The *McCleskey* Court then noted:

> "Although the 1966 revision to the habeas statute eliminated any reference to an 'ends of justice' inquiry, a plurality of the Court in *Kuhlmann* v. *Wilson*, 477 U. S., at 454, held that this inquiry remained appropriate, and required federal courts to entertain successive petitions when a petitioner supplements a constitutional claim with a 'colorable showing of factual innocence.' " *Ibid.*

It is upon this slender reed that colorable claim standard rests. Neither *Smith*, *Carrier*, nor *Dugger* cited *Kuhlmann*. The only other cases that deal with the colorable claim standard, *Sawyer* v. *Whitley*, *supra*, and *Herrera* v. *Collins*, 122 L. Ed. 2d 203, 113 S. Ct. 853 (1993), provide no support for the *Kuhlmann* plurality's standard. *Sawyer* substituted its clear and convincing standard for the *Kuhlmann* standard, see part II, *post*, at 12-17, while the statement in *Herrera* is dicta, since *Herrera* was not concerned with the innocence exception to the cause and prejudice test. See 122 L. Ed. 2d, at 219, 113 S. Ct., at 862. *McCleskey* is thus the only possible majority support for the colorable claim test.

It is extremely weak support at best. As noted above, the appropriate standard of innocence was not the main concern of the *McCleskey* Court. Nor is the *McCleskey* Court's statement of the *Kuhlmann* plurality's holding a ringing endorsement. *McCleskey* does not say that *Kuhlmann* provides the appropriate focus for the exception to the cause and prejudice test. Indeed,

the *McCleskey* Court presents *Kuhlmann* by indirection, first noting how its miscarriage of justice exception fulfills *Sanders*' ends of justice requirement, and then noting how *Kuhlmann* supplied the colorable claim standard to satisfy the *Sanders* requirement. See 499 U. S., at 495. This is not so much an endorsement as it is a historical reference of how *Kuhlmann* dealt with the *Sanders* requirement. See *post*, at 11-12. It is at best faint praise.

As in *Kuhlmann*, the *McCleskey* Court had little need to further examine the standard of innocence, because the district judge, after considering all the evidence, "entertain[ed] absolutely no doubt about the guilt of Mr. McCleskey." See 499 U. S., at 502. As the judgment would have been affirmed under any standard, the Court's cursory treatment of the standard of innocence is understandable.

Subsequent decisions have diverged from the *Kuhlmann* plurality in another crucial manner. The plurality viewed the innocence exception as the sole means of excusing a successive petition. See *Kuhlmann*, *supra*, 477 U. S., at 455; cf. *id.*, at 470-471 (Brennan, J., dissenting) (claiming, in effect, that Wilson had cause for default). Subsequent applications of the innocence exception, however, utilize the cause and prejudice test as the primary means of admitting successive petitions. See *McCleskey*, *supra*, 499 U. S., at 493; *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 279, 112 S. Ct. 2514, 2518 (1992). The cause and prejudice test that *Kuhlmann* omitted is expected to cover most fundamental miscarriages of justice. *Carrier*, *supra*, 477 U. S., at 495-496.

Thus while the subsequent decisions have adopted higher standards of innocence, they have actually relaxed entry for successive or abusive petitions by substituting the more common "cause" for the rare "innocence." Once the cause and prejudice test is in place, *Kuhlmann*'s colorable claim standard becomes unnecessary. This Court has implicitly recognized this position by its consistent refusal to rely on the colorable claim standard as anything more than a historical artifact.

C. The Kuhlmann Standard as Precedent.

Given its extremely limited precedential value, the colorable claim standard of *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986) does not control the present case. *Kuhlmann* is a plurality and therefore has no binding effect on its own. See *Alaska* v. *Troy*, 258 U. S. 101, 111 (1922).[3] No subsequent case justifies treating the *Kuhlmann* standard as binding precedent.[4] See part I B, *ante*, at 7-9.

The problem with the *Kuhlmann* standard is that it has never been squarely addressed by a majority of this Court. This situation is analogous to *Brecht* v. *Abrahamson*, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993), where this Court chose to adopt the "substantial influence" harmless error standard of *Kotteakos* v. *United States*, 328 U. S. 750, 776 (1946) for habeas cases in spite of the fact that several prior habeas cases applied the "harmless beyond a reasonable doubt" standard of *Chapman* v. *California*, 386 U. S. 18, 24 (1967). See, *e.g.*, *Yates* v. *Evatt*, 500 U. S. 391, 402-403 (1991); *Rose* v. *Clark*, 478 U. S. 570, 582 (1986); *Milton* v. *Wainwright*, 407 U. S. 371, 372 (1972); *Anderson* v. *Nelson*, 390 U. S. 523, 525 (1968) (*per curiam*). The rationale given by the *Brecht* Court demonstrates the importance of adequate explanation and analysis to a precedent's continuing validity.

> "[W]e have yet squarely to address its applicability on collateral review. Petitioner contends that we are bound by these habeas cases, by way of *stare decisis*, from holding that the *Kotteakos* harmless-error standard applies on habeas review of *Doyle* error. But since we have never *squarely* addressed the issue, and have at most assumed the applicability of the *Chapman* standard on habeas, we are free to address the issue on the merits." 123 L. Ed. 2d, at 368, 113 S. Ct., at 1718 (emphasis added) (footnote omitted).

3. While a holding can sometimes be distilled from split opinions by looking to the opinion decided on the narrowest ground, see *Romano* v. *Oklahoma*, No. 92-9093 (U. S., June 13, 1994) (slip op., at 6-7), this rule does not apply to *Kuhlmann*, because Justices White and Blackmun did not write a separate opinion; they simply chose not to join the successive petition discussion and joined only the "merits" portion.

4. *Kuhlmann* has, however, been affirmed by a majority of this Court for its main holding, that the "ends of justice" requirement of *Sanders* v. *United States*, 373 U. S. 1 (1963) must be focused into an examination of the prisoner's innocence. See *McCleskey* v. *Zant*, 499 U. S. 467, 495 (1991).

The relevance to the present case is both substantial and compelling. The closest a majority of this Court came to employing the *Kuhlmann* standard was in *McCleskey* v. *Zant*, 499 U. S. 467, 495 (1991), a case where the standard of innocence was unimportant to the matter before the Court. See *ante*, at 9. Like the cases dismissed in *Brecht*, *McCleskey*'s treatment of *Kuhlmann* is no more than an assumption of *Kuhlmann*'s applicability. It simply mentioned the existence of the plurality opinion. See 499 U. S., at 495. It did not even apply this standard when noting that McCleskey did not satisfy the innocence exception to the cause and prejudice test. See *id.*, at 502.

McCleskey's reference to *Kuhlmann* is also similar to the type of historical reference that was discounted in *Arizona* v. *Fulminante*, 499 U. S. 279 (1991). In *Chapman* v. *California*, this Court stated:

> "Although our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error,[8] this statement in *Fahy* itself belies any belief that all trial errors which violate the Constitution automatically call for reversal.
>
> "[8] See, *e.g.*, *Payne* v. *Arkansas*, 356 U. S. 560 (coerced confession); *Gideon* v. *Wainwright*, 372 U. S. 335 (right to counsel); *Tumey* v. *Ohio*, 273 U. S. 510 (impartial judge)."

Chapman, *supra*, 386 U. S., at 23. This statement did not prevent the *Fulminante* Court from finding involuntary confessions amenable to harmless error analysis. The *Fulminante* Court found the phrase in *Chapman* " '[a]lthough our prior cases have indicated' " and *Chapman*'s relegation of those cases to a footnote made it "more appropriately regarded as a historical reference to the holdings of these cases." 499 U. S., at 308. *Chapman*'s treatment of prior cases parallels *McCleskey*'s treatment of *Kuhlmann*. *McCleskey* simply alludes to the

existence of the *Kuhlmann* plurality. See *ante*, at 9. Although *McCleskey* did not relegate *Kuhlmann* to a footnote, it did not apply the *Kuhlmann* standard to the issue of McCleskey's innocence. See *McCleskey*, *supra*, 499 U. S., at 502.

Precedents are not all alike. Cases where the point was clearly at issue and thoroughly discussed and decided by a majority of the Court deserve and are given the full protection of *stare decisis*. *Kuhlmann*'s standard of innocence is not such a case. It is a plurality decision that gave little analytical support to its colorable claim standard. It has never been adopted by a majority of this Court in a way that gives it strength as precedent. Thus it should not prevent a careful examination of the question on the basis of *stare decisis*.

II. The *Sawyer* standard governs the present case.

Although the *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986) plurality opinion does not provide the standard to govern the present case, *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992) does. It squarely applied its clear and convincing standard to a guilt phase claim of innocence and thoroughly rejected the *Kuhlmann* standard. Because it is the only case to truly decide this issue, *Sawyer* governs the present case.

A. The Sawyer Standard.

The *Sawyer* Court was faced with the difficult task of determining when, if ever, a prisoner could be "innocent of the death penalty," and thus allow a habeas court to hear a procedurally defaulted, abusive, or successive challenge to his death sentence. *Id.*, 120 L. Ed. 2d, at 279, 112 S. Ct., at 2519-2520. What is first noteworthy is how little the *Sawyer* Court relied on *Kuhlmann* and its colorable claim standard. It referred to *Kuhlmann* in primarily historical terms. In a footnote, the Court stated that "[o]ur standard for determining actual innocence was articulated in *Kuhlmann* as:" and then quoted *Kuhlmann*'s colorable claim standard. *Id.*, 120 L. Ed. 2d, at 280, n. 5, 112 S. Ct., at 2519. "Our standard . . . was articulated . . . as" is too passive and historical to be considered an affirmation of the *Kuhlmann* standard. Instead, it is better viewed as a historical

reference that accords no precedential value to *Kuhlmann*. See *Arizona* v. *Fulminante*, 499 U. S. 279, 308 (1991); *ante*, at 11. Instead, the *Sawyer* Court developed its own standard of innocence.

The *Sawyer* Court saw itself confronted with two major problems. First was the difficult task of determining what was meant by the unnatural phrase "innocent of death." 120 L. Ed. 2d, at 281, 112 S. Ct., at 2520. The second problem was related, but distinct from the first. The Court had to fashion its answer in a way that kept the innocence exception narrow and workable so that the innocence exception does not swallow up the cause and prejudice test it is meant to serve.

> "In defining this analog, we bear in mind that the exception for 'actual innocence' is a very narrow exception, and that to make it workable it must be subject to determination by relatively objective standards. In the every day context of capital penalty proceedings, a federal district judge typically will be presented with a successive or abusive habeas petition a few days before, or even on the day of, a scheduled execution, and will have only a limited time to determine whether a petitioner has shown that his case falls within the 'actual innocence' exception if such a claim is made." *Ibid.*

The *Sawyer* Court solved the first problem by defining penalty "innocence" in terms of eligibility for the death penalty. Something had to qualify as innocence of the death penalty. Eligibility was close to the concept of innocence, while at the same time avoiding the type of open-ended inquiry that leads to abusive delays. See *id.*, 120 L. Ed. 2d, at 283-284, 112 S. Ct., at 2522.

This was not the end of the inquiry, however. The *Sawyer* Court understood that focusing on eligibility was not enough. Without a sufficiently narrow standard of demonstrating innocence, there could still be a danger of abuse. To further protect habeas corpus from capital prisoners' manipulation, the *Sawyer* Court established an appropriately high standard of innocence. It established that the prisoner must "show by clear and convincing evidence that but for constitutional error at his sentencing hearing, no reasonable juror would have found him eligible for

the death penalty . . . ." *Id.*, 120 L. Ed. 2d, at 287, 112 S. Ct., at 2525. This standard was applied to both guilt and penalty phase claims in *Sawyer* and thus governs the present case.

Sawyer made two distinct claims against his death sentence. One claim concerned evidence regarding the question of whether he burned his victim with lighter fluid, which Sawyer claimed was withheld in violation of *Brady* v. *Maryland*, 373 U. S. 83 (1963). *Sawyer*, 120 L. Ed. 2d, at 285, 112 S. Ct., at 2523. The second was that his trial counsel rendered ineffective assistance in failing to introduce evidence of Sawyer's earlier stays in mental hospitals. *Ibid.* The *Sawyer* Court dismissed the second claim out of hand, as it did not go to his eligibility for the death sentence. *Id.*, 120 L. Ed. 2d, at 285-286, 112 S. Ct., at 2523-2524.

The *Brady* claim was much more important, because it attacked both Sawyer's sentence and his underlying conviction. Sawyer was convicted of first-degree murder with two valid aggravating circumstances, "that the murder was committed in the course of an aggravated arson, and that the murder was especially cruel, atrocious and heinous." *Id.*, 120 L. Ed. 2d, at 285, 112 S. Ct., at 2523. Of the various forms of first-degree murder in Louisiana, the only one that could support Sawyer's conviction was " '[w]hen the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of . . . aggravated arson . . . .' " *State* v. *Sawyer*, 422 So. 2d 95, 98-99 (La. 1982) (quoting La. Rev. Stat. Ann. § 14:30 (West 1986). Therefore, any attack on aggravated arson was both an attack on Sawyer's eligibility for the death penalty *and* an attack on his guilt of the underlying crime, first-degree murder. See 120 L. Ed. 2d, at 286, 112 S. Ct., at 2524.

Sawyer's *Brady* claim contained two groups of evidence. The first was evidence impeaching Cynthia Shano, whose trial testimony supported the aggravated arson finding. See *ibid.*; 422 So. 2d, at 98, 99. Sawyer asserted that this evidence supported a "colorable showing" that he was innocent of the underlying crime. See Brief for Petitioner in *Sawyer* v. *Whitley*, No. 91-6382, p. 49 ("Sawyer Brief"). In dismissing this guilt phase claim, the *Sawyer* Court relied solely upon the clear and convincing standard. "This sort of latter day evidence brought

forward to impeach a prosecution witness will seldom, if ever, make a *clear and convincing* showing that no reasonable juror would have believed the heart of Shano's account of petitioner's actions. 120 L. Ed. 2d, at 286, 112 S. Ct., at 2524 (emphasis added). *Kuhlmann* was entirely absent from this discussion.

The second aspect of the *Brady* claim raised a stronger attack against the murder conviction. This was an affidavit by Diane Thibodeaux, who claimed to have heard the four-year-old who witnessed the killing make statements exculpating Sawyer from the aggravated arson. *Ibid.* Even though Sawyer was asserting his innocence of both his crime and sentence, see Sawyer Brief 49, the *Sawyer* Court used the same clear and convincing standard to dismiss both claims.

> "As for the finding of aggravated arson, we agree with the Court of Appeals that, even crediting the information in the hearsay affidavit,[18] it cannot be said that no reasonable juror would have found, in light of all the evidence, that petitioner was guilty of the aggravated arson for his participation under the Louisiana law of principals.

> "[18] Wayne Shano apparently has no clear memory of the crime today. 2 App. 602-603. This fact, together with his tender years at the time of the occurrence, suggests that Wayne himself would not corroborate the affidavit of Diane Thibodeaux, thus suggesting an independent basis for refusing to find that the affidavit showed anything by *clear and convincing evidence*." *Id.*, 120 L. Ed. 2d, at 286-287, 112 S. Ct., at 2524 (emphasis added).

This makes the case against the *Kuhlmann* standard compelling. If the colorable claim standard had any vitality it would have been applied to this last aspect of Sawyer's claim. The fact that the clear and convincing standard was used instead demonstrates that the *Kuhlmann* standard did not survive *Sawyer*. Indeed, no Justice in *Sawyer* believed that the *Kuhlmann* standard should govern claims of innocence. The opponents of the clear and convincing standard would have replaced it not with *Kuhlmann*'s colorable claim, but with the higher "*more likely than not*" standard. *Id.*, at 120 L. Ed. 2d, at 295, 112 S. Ct., at 2531 (Stevens, J., concurring in the judgment)

(emphasis in original). As the *Sawyer* majority implicitly recognized, the colorable claim standard, as applied to the innocence exception, was only a historical artifact. See 120 L. Ed. 2d, at 280, n. 5, 112 S. Ct., at 2519, n. 5.

B. The Ineffective Distinction.

Petitioner endeavors to avoid the *Sawyer* standard by pigeonholing it as a way of narrowing the focus of "innocent of the death penalty" claims. Pet. Brief 27-28. It is true that the *Sawyer* Court was concerned about promulgating a broad or subjective definition of innocence of the penalty. Thus it properly dismissed the notion that the innocence question should focus on the accuracy of the prisoner's sentencing profile because such an inquiry would be too broad and difficult to apply. *Sawyer*, 120 L. Ed. 2d, at 284, 112 S. Ct., at 2522.

The *Sawyer* Court solved this problem by limiting the innocence question to the narrow, objective eligibility issue. While the decision to impose death involved the "individualized consideration of a particular defendant," *id.*, 120 L. Ed. 2d, at 282, 112 S. Ct., at 2521, eligibility focuses "on the *objective* factors or conditions which must be shown to exist before a defendant is eligible to have the death penalty imposed." *Id.*, 120 L. Ed. 2d, at 284, 112 S. Ct., 2523 (emphasis added).

Petitioner claims that the clear and convincing standard was imposed to narrow eligibility factors that "turn in many cases upon a highly discretionary jury judgment (such as whether ' "the offense was committed in an especially cruel, atrocious and heinous manner." ')." Pet. Brief 28 (quoting *Sawyer*, *supra*, 120 L. Ed. 2d, at 278, n. 2, 112 L. Ed. 2d, at 2517, n. 2). This demonstrates a fundamental misunderstanding of eligibility factors in capital cases. The entire purpose of the eligibility determination is to *limit* jury discretion. It "must genuinely *narrow* the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant* v. *Stephens*, 462 U. S. 862, 877 (1983) (emphasis added). A state's eligibility requirement therefore must achieve its narrowing task "by providing 'specific and detailed guidance' to the sentencer," *McCleskey* v. *Kemp*, 481 U. S. 279, 303 (1987) (quoting *Proffitt* v. *Florida*, 428 U. S. 242, 253 (1976)), so that it "channel[s] the sentencer's discretion." *Lewis* v. *Jeffers*, 497 U. S. 764, 774 (1990). An eligibility factor that turned on "highly discretionary jury judgment," Pet. Brief 28, would violate the Eighth Amendment. Indeed, the very language petitioner cites, *ibid.*, would be struck down if it were not given a narrowing construction by the state courts. *Lewis* v. *Jeffers*, 497 U. S., at 776-777.

Thus, as the *Sawyer* Court understood, once the inquiry was shifted to eligibility, further narrowing was unnecessary. The clear and convincing standard did not deal with the already solved narrowing problem, but instead dealt with the problem of preserving the integrity of verdicts and avoiding needless stays, problems that are common to both the guilt and penalty determinations. See part III B, *post*, at 21-24. Because it provides a solution to a universal problem, *Sawyer*'s clear and convincing standard should be applied universally. The *Sawyer* Court understood this and thus applied the standard to Sawyer's challenges to his sentence *and* his conviction. In applying the clear and convincing standard to Schlup's challenge of his conviction, the Court below was simply following in the footsteps of the *Sawyer* Court. *Stare decisis* demanded no less, and *stare decisis* requires affirming the Court below.

III. The *Sawyer* standard is superior to the *Kuhlmann* standard.

The case for giving controlling effect to *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992) is both clear and strong. See part II, *ante*, at 12-17. Any remaining doubts about the relative precedential value of *Sawyer* and *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986) are swept away by comparing the practical effect of the two cases. The colorable claim standard of *Kuhlmann* would have been useful for Judge Friendly's intended purpose as a filter on *all* habeas cases, but it is ill-suited as an exception to the cause and prejudice test for second petitions. The *Kuhlmann* standard would be yet another weapon in the arsenal of delay that too often frustrates society's essential interest in obtaining swift execution of punishment.

The *Sawyer* standard was designed with this problem in mind. It will help avoid needless stays and improper collateral attacks upon convictions. At the same time, *Sawyer* will continue to protect the miscarriage of justice standard by allowing collateral attacks by those who are actually innocent. Because it strikes the proper balance between respect for finality and the prisoner's interests, the *Sawyer* standard makes sense both as a matter of *stare decisis* and sound judicial policy.

A. The Myth of Innocence.

The prisoner and supporting *amicus* both endeavor to support the *Kuhlmann* standard as necessary to protect supposed potential multitudes of innocently convicted prisoners sitting out their sentences or, more importantly, awaiting execution. See Pet. Brief 32-33. Brief for Five Innocent Former Death Row Inmates & Centurion Ministries as *Amicus Curiae* (hereinafter Centurion Brief) 10-11. However, as this Court's habeas cases correctly presume, conviction of the innocent is an exceedingly rare event. More importantly, a second round of federal habeas has not yet been needed to free an allegedly innocent prisoner.

This Court's habeas jurisprudence is built on the assumption that the overwhelming majority of those convicted are guilty. Thus, a presumption of regularity attaches to convictions. See *Johnson* v. *Zerbst*, 304 U. S. 458, 468 (1938). There are an enormous number of constitutional rights designed to protect the innocent at trial, see *ante*, at 3, making the trial, not collateral attack, the main event of the criminal justice system. See *Wainwright* v. *Sykes*, 433 U. S. 72, 90 (1977). It is thus understandable that innocence is expected to be no more than a narrow exception, reserved for the "extraordinary case . . . ." *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986).

Experience shows the correctness of this Court's findings. A study alleging numerous executions of innocent people, see Bedau & Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21 (1987), is demolished, to the extent it applies to our modern legal system, in a point by point rebuttal. See Markman & Cassell, Protecting the Innocent: A Response to the Bedau-Radelet Study, 41 Stan. L. Rev. 121 (1988). Great *cause celebres* thought to be innocent turn out to be guilty in the eyes of nonpartisan history. See generally F.

Russell, Sacco & Vanzetti, The Case Resolved (1986). In the overwhelming majority of cases, the American criminal justice system *does* work. More importantly, neither Schlup nor Centurion Ministries has provided this Court with a case where a *second* federal habeas petition was needed to free an innocent person.

Petitioner gives two main examples of the danger of setting the innocence standard too high, the "Scottsboro Boys" and the Leo Frank case. Pet. Brief 33-34. While these cases no doubt represent low points in American legal history, they do not show that extraordinary habeas measures are now needed to protect innocent people from the state. The Scottsboro Boys had their initial convictions reversed on direct review in one of this Court's landmark cases. See *Powell* v. *Alabama*, 287 U. S. 45 (1932). While Leo Frank's claims were rejected in his initial (and only) round of habeas corpus, see *Frank* v. *Mangum*, 237 U. S. 309 (1915), the critical question was whether the trial was mob dominated as a factual matter. See *id.*, at 333. If a mob-dominated trial would occur today, it would certainly be overturned in state court or the first federal petition. *Frank* v. *Mangum* is not relevant to successive petitions.

More importantly, times have changed. Whatever problems exist today, they are far removed from the pervasive religious and racial animus that dominated the Scottsboro and Frank cases. Furthermore, the ensuing years have seen the creation of a host of constitutional rights designed to help innocent defendants. See *Herrera* v. *Collins*, 122 L. Ed. 2d 203, 215-216, 113 S. Ct. 853, 859-860 (1993). Finally, the days are gone when state courts would resist the commands of the federal Constitution. Cf. *Estes* v. *Texas*, 381 U. S. 532, 556 (1965). Today, the state courts are recognized as coequal partners with the lower federal courts and willing protectors of the Constitution. See *Sawyer* v. *Smith*, 497 U. S. 227, 241 (1990). The threat of Scottsboro is gone.

Centurion Ministries' case is no better. None of the five former death row members represented in the brief needed to resort to the *Kuhlmann* standard to be freed.

Randall Dale Adams had his death sentence vacated by this Court on direct review, *Adams* v. *Texas*, 448 U. S. 38 (1980); and was removed from death row by executive clemency at the

request of the prosecutor. See *Ex parte Adams*, 768 S. W. 2d 281, 293 (Tex. Crim. App. 1989). His conviction was subsequently set aside in a state, not federal, proceeding. *Id.*, at 294. Furthermore, the basis of Adams' conviction, the prosecution's knowing but undisclosed use of false evidence and the suppression of exculpatory evidence, see *id.*, at 284, would certainly satisfy the cause and prejudice test. See *Amadeo* v. *Zant*, 486 U. S. 214, 222 (1988); cf. *Engle* v. *Isaac*, 456 U. S. 107, 135 (1982) (most fundamentally unjust convictions will satisfy the cause and prejudice test).

Kirk Bloodsworth's initial conviction and death sentence were overturned for failure to disclose exculpatory evidence on direct review in state court. See *Bloodsworth* v. *State*, 512 A. 2d 1056, 1061 (Md. 1986). On retrial, he was reconvicted but sentenced to life in prison. *Bloodsworth* v. *State*, 543 A. 2d 382, 384 (Md. App. 1988). Once DNA testing demonstrated Bloodsworth's innocence, the State of Maryland freed him. See J. Valentine, Jailed for Murder, Freed by DNA, The Washington Post, June 29, 1993, p. A1, col. 1. This new scientific technique precluded the need to go to the federal court.

Clarence Lee Brandley was released in a state proceeding. *Ex parte Brandley*, 781 S. W. 2d 886 (Tex. Crim. App. 1989). As in *Adams*, the state's suppression of exculpatory evidence, see *id.*, at 894, is the type of violation that would satisfy the cause and prejudice test. While it was a federal court that reversed Joseph Green Brown's conviction due to the prosecution's knowing use of perjured testimony, it was on his initial petition; there was no need to resort to the cause and prejudice test or *Kuhlmann*. See *Brown* v. *Wainwright*, 785 F. 2d 1457, 1458 (CA11 1986). Finally, Walter McMillan's conviction was reversed in state court because of the state's suppression of exculpatory evidence. See *McMillan* v. *State*, 616 So. 2d 933, 949 (Ala. Crim. App. 1993).

It is also noteworthy that *all five* cases involved either the suppression of evidence or the knowing use of false evidence, classic examples of "cause" under the *Sykes* test. See *Amadeo*, *supra*, 486 U. S., at 222. Far from providing justification for the *Kuhlmann* standard, Centurion Ministries gives compelling evidence of the wisdom of *Carrier*'s conclusion that in virtually

every case of a fundamental miscarriage of justice, the prisoner will satisfy the cause and prejudice test.

In spite of their considerable efforts, neither petitioner nor Centurion Ministries has found an example of an innocent person exonerated on a successive federal petition. Instead, their examples show how well the system works without having to resort to the innocence exception. At trial, the defendant is lavishly protected by constitutional rights. See *Engle*, *supra*, 456 U. S., at 127. On appeal, the defendant will be entitled to court appointed counsel. *Douglas* v. *California*, 372 U. S. 353 (1963). Finally, the prisoner will get an initial round of state and federal habeas corpus and the chance of direct review in this Court to present his claims. Given the considerable lengths our system goes to in protecting the innocent, it is entirely understandable that the *Kuhlmann* standard has not been needed.

A recent development has further lessened the already minimal need for relaxed standards of innocence. In 1988, as part of the Anti-Drug Abuse Act of 1988, Congress enacted extensive provisions for federal funding of collateral attacks by prisoners sentenced to death. See 21 U. S. C. § 848(q)(4)(B); *McFarland* v. *Scott*, No. 93-6497 (U. S., June 30, 1994). Federally funded counsel will no doubt even further reduce the already minimal chance of claims being accidentally abandoned or overlooked on the initial collateral attack. Cf. *Murray* v. *Giarratano*, 492 U. S. 1, 14 (1989) (Kennedy, J., concurring in the judgment). While it is true that this system was not in place for the bulk of the first round of collateral review in the present case, see Pet. Brief 7-9, it is equally true that in the future all capital prisoners will have federal funding for their initial habeas petitions. The risk of inept habeas counsel will fade away for capital prisoners, making the need for the lenient *Kuhlmann* standard even lower.

B. The Real Risks.

1. The problem with stays.

Although the need for the lower standard of *Kuhlmann* is minimal, see part III A, *ante*, at 18-21, its risks are all too real. The *Kuhlmann* standard is an open invitation to the abusive use

of stays of execution this Court sought to limit in *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992).

This Court is intimately aware of the problems of stays of execution in federal habeas corpus. See, *e.g.*, *Sawyer*, *supra*, 120 L. Ed. 2d, at 281, n. 7, 112 S. Ct., at 2520, n. 7; *Gomez* v. *District Court*, 118 L. Ed. 2d 293, 296, 112 S. Ct. 1652, 1653 (1992) (*per curiam*). A prisoner under a sentence of death has everything to gain and nothing to lose when attempting to gain a stay of execution. For a prisoner who has no real chance of reversing his conviction or sentence, obtaining a stay of execution is like winning the case. So long as he frustrates the state's right to execute its judgment, the prisoner wins.

The cause and prejudice test and the innocence exception play an important role in reducing the risk of abusive stays. A major problem with habeas corpus is the eleventh-hour stay of execution granted by a federal court because it feels it does not have time to review the issues raised by the prisoner before his execution. See *Sawyer*, *supra*, 120 L. Ed. 2d, at 281, n. 7, 112 S. Ct., at 2520, n. 7. Because these last minute requests for stays will almost always involve procedurally barred, abusive, or successive claims, the cause and prejudice test and the innocence exception can play important roles in resolving most of these dilemmas for the federal courts. This test and its innocence exception help channel the inquiry and discretion of federal habeas courts when faced with the issue of whether to accept for decision a defaulted, abusive, or successive claim. See *Murray* v. *Carrier*, 477 U. S. 478, 496-497 (1986). A properly narrow cause and prejudice test and innocence exception can thus take much pressure off the federal courts by filtering out weak claims.

The *Kuhlmann* standard frustrates this goal by needlessly lowering the threshold of innocence. The *Kuhlmann* plurality only requires that the prisoner show "a colorable claim of factual innocence." *Kuhlmann* v. *Wilson*, 477 U. S. 436, 454 (1986).

There are real dangers to applying this improperly lax standard. A particularly forthright example of this is the ghoulish circus that attended the execution of Robert Alton Harris. As this Court knows too well, the night before Harris' execution various judges in the Ninth Circuit issued four

different stays of execution, one of which was made in defiance of this Court's previous decision to vacate earlier Ninth Circuit stays. See Note, The Robert Alton Harris Decision: Federalism, Comity, and Judicial Civil Disobedience, 23 Golden Gate U. L. Rev. 155, 160-161, 194 (1993) ("Harris Case"); *Gomez*, *supra*, 118 L. Ed. 2d, at 296, 112 S. Ct., at 1653. This grim spectacle included one stay of execution that reached "the prison after Harris had already been strapped into the chair." Harris Case, *supra*, 23 Golden Gate U. L. Rev., at 161. The hours leading up to Harris' execution were a war of attrition fought with phones and fax machines that could not be concluded until this Court prevented all federal courts but itself from staying Harris' execution. See *Vasquez* v. *Harris*, 118 L. Ed. 2d 419, 112 S. Ct. 1713, 1714 (1992). This unseemly and unnecessary battle brought down considerable criticism of our legal system. See Harris Case, *supra*, 23 Golden Gate U. L. Rev., at 157, nn. 17-18.

While the bulk of the stays in the *Harris* case involved a spurious Eighth Amendment challenge to the gas chamber intended to extract a last minute stay of execution, see *Gomez*, *supra*, 118 L. Ed. 2d, at 269, 112 S. Ct., at 1653, the question of innocence also played a part in this spectacle. The first stay issued by a Ninth Circuit judge was on the ground that "a sufficient hearing had not been granted on new evidence that Harris' brother and partner in crime, Daniel had shot one of the two victims Harris was convicted of murdering." Harris Case, *supra*, 23 Golden Gate U. L. Rev., at 160. This claim of innocence was certainly spurious. Harris had confessed to committing the murders on seven separate occasions. See Lungren & Krotoski, Public Policy Lessons from the Robert Alton Harris Case, 40 U. C. L. A. L. Rev. 295, 297-298, n. 5 (1992). Furthermore, Harris' claim that his brother had shot the boys had previously been rejected by U. S. District Judge Howard B. Turrentine, who stated that had the claim been true "it would have been discovered a long time ago." Harris Case, *supra*, 23 Golden Gate U. L. Rev., at 199, n. 324.

Granting of a stay on such flimsy evidence shows the need to depart from the relatively mild *Kuhlmann* standard. While, as the first stay unfortunately shows, some may entertain reasonable doubt on such minuscule evidence, no judge could possibly

believe that this claim proved his innocence by the clear and convincing evidence standard of *Sawyer*. Furthermore, the higher standard of *Sawyer* would send a signal to the lower federal courts regarding the high confidence they must place in convictions. See *Addington* v. *Texas*, 441 U. S. 418, 423 (1979). This signal can only dissuade federal courts from granting such needless stays.

2. Subverting cause and prejudice.

The innocence exception to the cause and prejudice test must establish a standard high enough to distinguish the innocence test from the prejudice required in constitutional cases such as *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984). *Sawyer*, *supra*, 120 L. Ed. 2d, at 283-284, 112 S. Ct., at 2522. A standard that did not clear this hurdle would subvert the cause and prejudice test. *Id.*, 120 L. Ed. 2d, at 284, n. 13, 12 S. Ct., at 2522, n. 13. The colorable claim standard cannot clear this hurdle.

The *Strickland* standard of prejudice is that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, *supra*, 466 U. S., at 694. This is effectively the same as the colorable claim standard in "a fair probability that, in light of all the evidence . . . the trier of facts would have entertained a reasonable doubt of his guilt." *Kuhlmann* v. *Wilson*, 477 U. S. 436, 455, n. 17 (1986). There is no real difference between "a reasonable probability . . . that the result of the proceeding" would change from guilty to not guilty, and a "fair probability" that the factfinder would entertain reasonable doubt. Yet there must be some difference between prejudice and the standard of innocence. In order to preserve the cause and prejudice test, a higher standard must be found.

C. The Sawyer Solution.

The solution to the problems posed by the *Kuhlmann* standard is found in *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992). As the *Sawyer* Court understood, its clear and convincing standard is best for innocence claims made against either guilt or penalty findings. See *ante*, at 13-16. It strikes the proper balance between the need to preserve finality

and the desire to prevent fundamental miscarriages of justice. Finally, it sends the appropriate signal to the courts and public about the high confidence they should have in the validity of convictions.

An integral part of habeas corpus jurisprudence is assessing costs and benefits. See, *e.g.*, *McCleskey* v. *Zant*, 499 U. S. 467, 490-493 (1991); *Teague* v. *Lane*, 489 U. S. 288, 310 (1989) (plurality). As this type of analysis is also important to the adoption of standards of proof, see, *e.g.*, *Addington* v. *Texas*, 441 U. S. 418, 423-424 (1979), it makes sense to assess the costs and benefits of the innocence exception.

The benefit of the innocence exception, voiding convictions of innocent people, is very important, but extraordinary. See *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986). History shows that the conviction of the innocent is mercifully rare, and that the innocence exception to the cause and prejudice test has not been necessary to protect the very few innocent prisoners. See part III A, *ante*, at 18-21. Given the lavish constitutional protections afforded defendants, this comes as no surprise. See *Herrera* v. *Collins*, 122 L. Ed. 2d 203, 215-216, 113 S. Ct. 853, 859-860 (1993). Any assessment of the standard of proof for the innocence exception must keep the extreme rarity of innocence in mind.

The rareness of innocence also creates a risk to the truly innocent prisoner if the standard of proof is too low. "It must prejudice the occasional meritorious application to be buried in a flood of worthless ones." *Brown* v. *Allen*, 344 U. S. 443, 537 (1953) (Jackson, J., concurring); accord, *McCleskey*, *supra*, 499 U. S., at 492. This risk is all too real with respect to claims of innocence. The convicted, particularly those under a death sentence, have nothing to lose and everything to gain by proclaiming their innocence. The cynical abuse of federal habeas corpus by some counsel, see *Gomez* v. *District Court*, 118 L. Ed. 2d 293, 296, 112 S. Ct. 1652, 1653 (1992) (*per curiam*), and the fact that some federal judges will buy into spurious last minute claims of innocence, see *ante*, at 23-24, renders these fears tangible. A sufficiently high standard will thus help protect the few who are truly innocent by filtering out the many spurious claims.

The costs of federal habeas are well known. Reexamination of state convictions "frustrate[s] . . . 'both the State's sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.' " *Carrier*, *supra*, 477 U. S., at 487 (quoting *Engle* v. *Isaac*, 456 U. S. 107, 128 (1982)). The lack of finality associated with habeas corpus deprives the criminal law "of much of its deterrent effect." *Teague*, *supra*, 489 U. S., at 309. If the petitioner succeeds in getting a reversal, the passage of time can make retrial very difficult. *McCleskey*, *supra*, 499 U. S., at 491. The state's power to enact and enforce criminal law means little if habeas corpus frustrates its enforcement. *Ibid*. Federal habeas corpus also places a heavy burden on scarce federal judicial resources and threatens the capacity of the system to resolve primary disputes." *Ibid*. Finally, it creates the risk of sandbagging, where litigants have an incentive "to withhold claims for manipulative purposes and may establish disincentives to present claims when evidence is fresh." *Id.*, at 491-492.

These costs accelerate dramatically on successive and abusive petitions. "Perpetual disrespect for the finality of convictions disparages the entire criminal justice system." *Id.*, at 492. Sadly, successive and abusive petitions are a much abused tool of delay. See *Sawyer*, *supra*, 120 L. Ed. 2d, at 281, n. 7, 112 S. Ct., at 2520, n. 7. Furthermore, successive petitions spread the already thin federal judicial resources even thinner and exacerbate the risk of losing the rare meritorious claims in a sea of spurious claims. *McCleskey*, *supra*, 499 U. S., at 492.

Sawyer's clear and convincing standard maintains an appropriate balance of costs and benefits. While there will be a few rare cases of actual innocence, the bulk of claims will be spurious, and the clear and convincing standard will provide the proper filter for these claims.

The prisoner invoking the innocence exception does not write on a clean slate. There is a presumption against hearing claims defaulted in state court or not heard in the first round of federal habeas corpus. *Id.*, at 490. Furthermore, habeas petitioners generally have the burden of proving the illegality of their conviction. *Johnson* v. *Zerbst*, 304 U. S. 458, 468 (1938); *Hawk* v. *Olson*, 326 U. S. 271, 279 (1945). The clear and convincing standard gives teeth to the further presumption

against defaulted, abusive, or successive claims. The standard of proof allocates risk of error between the parties in an action. See *Addington*, *supra*, 441 U. S., at 423-424. Given the strong presumptions against his claim, and the minimal risk that a habeas petitioner is actually innocent, it makes sense to require a strong showing for further collateral attack.

The *Sawyer* standard is also consistent with the cause and prejudice test. The *Kuhlmann* standard is close enough to simple prejudice to threaten the cause and prejudice test by eliminating the need for cause. See part III B 2, *ante*, at 24. The *Sawyer* Court was well aware of this risk, 120 L. Ed. 2d, at 284, n. 13, 112 S. Ct., at 2522, n. 13, and the clear and convincing standard keeps the cause and prejudice test safe.

The standard of proof reflects society's interest in the confidence a factfinder must have in its decision. *Addington*, *supra*, 441 U. S., at 423. It also conveys important symbolic meaning. *Id.*, at 426. The *Sawyer* standard succeeds on both counts. It informs the federal courts of the justified confidence they must have in state convictions, and they should be very careful before exercising the truly extraordinary innocence exception to the cause and prejudice test. Any lower standard can only imperil the cause and prejudice test and the many habeas reforms it serves.

CONCLUSION

The decision of the Eighth Circuit should be affirmed.

July, 1994

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1994

LLOYD E. SCHLUP, JR.,

Petitioner,

v.

PAUL DELO, Superintendent,
Potosi Correctional Center,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, IDAHO, ILLINOIS, KENTUCKY, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

On a second (or subsequent) habeas corpus petition, should a petitioner be entitled to federal review of a miscarriage of justice claim concerning the guilt-innocence stage when State post-conviction opportunities to present newly discovered evidence of innocence have not been completed? Should the *Sawyer v. Whitley* standard or the *Kuhlmann v. Wilson* standard govern guilt-innocence stage claims under this "narrow" exception?

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No. 93-7901

In The

Supreme Court of the United States

October Term, 1994

LLOYD E. SCHLUP, JR.,

Petitioner,

v.

PAUL DELO, Superintendent,
Potosi Correctional Center,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF THE STATES OF CALIFORNIA, ET AL., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI*

Amici are States who have concerns about obtaining finality, the enforcement of their state laws, and the orderly and proper administration of their criminal justice systems. Since the States must bear most of the costs of federal habeas review, *amici* have an interest in minimizing these costs by encouraging the adjudication of guilt or innocence at the state trial, often considered the "main event," or through established state "safety valve" post-conviction mechanisms which permit consideration of newly discovered evidence of innocence once an adequate showing has been made.

This brief is submitted by *amici* through their respective Attorneys General in accordance with Rule 37.5 of the Rules of the Supreme Court.

STATEMENT OF FACTS AND PROCEEDINGS

On December 11, 1985, petitioner Lloyd E. Schlup was convicted of capital murder and was sentenced to death for his involvement in the stabbing and murder of a fellow inmate at the Missouri State Penitentiary. The Missouri Supreme Court affirmed the conviction and sentence. *State v. Schlup*, 724 S.W.2d 236 (Mo.), *cert. denied*, 482 U.S. 920 (1987).

Petitioner's motion for state post-conviction relief was denied following an evidentiary hearing. The Missouri Supreme Court affirmed the denial of post-conviction relief. *Schlup v. State*, 758 S.W.2d 715 (Mo. 1988). The petitioner then commenced his first federal habeas action, raising several claims based on ineffective assistance of counsel. The federal district court's judgment denying federal habeas relief was affirmed on appeal by the U.S. Court of Appeals for the Eighth Circuit. *Schlup v. Armontrout*, 941 F.2d 631 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 1273 (1992).

Petitioner filed a second petition for writ of habeas corpus, contending that newly discovered evidence suggested he was not present at the scene of the murder. Relief was denied by the federal district court in an unpublished opinion. *See* Joint Appendix, at 68-89. On appeal, a divided panel of the Eighth Circuit affirmed the judgment of the district court. *Schlup v. Delo*, 11 F.3d 738 (8th Cir. 1993). The majority opinion agreed with the district court that petitioner could not meet the "cause and prejudice" exception to permit review on the merits of the second habeas petition. *Id.* at 739. Turning to consideration of petitioner's guilt-innocence stage claim under the "miscarriage of justice" exception, the majority opinion, following Eighth Circuit precedent, applied the *Sawyer v. Whitley* standard, and not the *Kuhlmann v. Wilson* test advocated by petitioner, and denied relief. *Id.* at 740. This Court granted certiorari review. 114 S.Ct. 1368, 128 L.Ed.2d 45 (1994).

SUMMARY OF ARGUMENT

Each State has adopted procedures for the consideration of post-conviction claims of newly discovered evidence in appropriate circumstances. These mechanisms, including a motion for a new trial, collateral or habeas remedies, and clemency, furnish a suitable State "safety valve" for those rare cases where evidence of actual innocence could not be considered during the state trial (often considered the "main event") or on direct review.

This case presents serious federalism questions concerning the ability of States to establish post-conviction remedies for the consideration of newly discovered claims of innocence as part of their criminal justice systems. A federal miscarriage of justice standard should be designed to encourage the use of these state post-conviction avenues in the first instance. *Cf. Herrera v. Collins*, 506 U.S. ___, 113 S.Ct. 853, 869, 122 L.Ed.2d 203 (1993) (assuming *arguendo* federal habeas relief would be warranted "if there were no state avenue open to process" a post-conviction claim of "a truly persuasive demonstration of 'actual innocence' "). The central question is what threshold showing should be required so that the "narrow" miscarriage of justice exception promotes finality; advances comity interests and does not undercut available state post-conviction remedies; does not swallow or undermine the "cause and prejudice" exception or the general habeas rule prohibiting successive, abusive, or defaulted claims; and allows for consideration of those extraordinary constitutional claims involving actual innocence where appropriate.

The miscarriage of justice exception establishes a threshold "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera*, 113 S.Ct. at 862. In *Sawyer v. Whitley*, this Court defined the miscarriage of justice exception to require a petitioner to "show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable State law." 505 U.S. ___, 112 S.Ct. 2514,

2517, 120 L.Ed.2d 269 (1992). Petitioner argues that guilt-innocence stage claims should be governed by the "somewhat lower" *Kuhlmann v. Wilson* standard (requiring "a fair probability that, in light of all the evidence, . . . the trier of fact would have entertained a reasonable doubt of his guilt"), 477 U.S. 436, 454 n.17 (1986) (plurality opinion) (citation omitted), and the *Sawyer* standard should be restricted to sentencing stage claims.

The *Sawyer* standard should apply to both guilt-innocence and sentencing stage claims for at least six reasons: (1) the three miscarriage of justice definitions considered by the *Sawyer* Court embraced claims concerning "innocence of the capital crime itself"; (2) the *Sawyer* standard was actually applied in *Sawyer* to a guilt-innocence stage claim; (3) the *Sawyer* standard is sufficiently high to encourage first resort to comparable state post-conviction remedies and avoids undercutting these state mechanisms or the state criminal justice interests supporting them; (4) application of the *Sawyer* standard avoids disparate results to the interest in finality when both guilt-innocence and sentencing stage claims are raised; this would occur under the "lower burden of proof" under the *Kuhlmann* standard when contrasted with claims considered under the higher "clear and convincing" *Sawyer* standard; (5) lower federal courts have recognized *Sawyer* simply "clarified" the *Kuhlmann* standard and have applied *Sawyer* to guilt-innocence stage claims; and (6) application of the *Sawyer* standard to guilt-innocence and sentencing stage claims promotes certainty and uniformity.

Finally, assuming *arguendo* that the *Sawyer* standard is not applied to guilt-innocence stage claims, *amici* respectfully highlight several attributes for an alternative miscarriage of justice standard.

ARGUMENT

I. Substantial State Interests Are Affected By The Collateral Review Process And "Miscarriage Of Justice" Claims

The State interests implicated in this case can best be assessed by considering the context in which "miscarriage of

justice" claims typically arise and by reviewing the state and federal proceedings which usually precede these claims.[1]

A. The Direct Review Process And The Central Role Of The "Main Event" In Our Criminal Justice System

As a primary matter, the factual question of guilt or innocence is determined at the state trial, often referred to as the "main event."[2] As Justice O'Connor has noted, "Our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent." *Herrera*, 113 S.Ct. at 871 (O'Connor, J., concurring); *see also id.* at 859-60 (citing constitutional provisions which protect "against the risk of convicting an innocent person"). Toward this end, the state court holds "the initial responsibility for vindicating

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[1] As a threshold matter, petitioner cannot prevail under the miscarriage of justice exception without establishing a constitutional right violation. *See* note 17, *infra*. The U.S. District Court found petitioner had failed to make such a showing, concluding there was no violation under *Brady v. Maryland*, 373 U.S. 83 (1963). *See* Joint Appendix, at 82-83, 84. The U.S. Court of Appeals for the Eighth Circuit did not expressly address this issue and may have implicitly assumed *arguendo* the existence of a constitutional violation, yet nonetheless denied habeas relief under the miscarriage of justice exception. On at least three occasions, this Court has adopted a similar approach where habeas relief was ultimately denied. *See Smith v. Murray*, 477 U.S. 527, 529, 533 (1986); *id.* at 539-40 (Stevens, J., dissenting); *Engle v. Isaac*, 456 U.S. 107, 122-23 (1982); *Wainwright v. Sykes* 433 U.S. 72, 87 & n.11 (1977).

[2] *Wainwright*, 433 U.S. at 90; *see also Herrera v. Collins*, 113 S.Ct. 853, 869, 122 L.Ed.2d 203 (1993) (noting "in state criminal proceedings the trial is the *paramount event* for determining the guilt or innocence of the defendant") (emphasis added); *Engle*, 456 U.S. at 127 ("A criminal trial concentrates society's resources at one time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence.") (citation and internal quotation marks omitted); *Ross v. Moffitt*, 417 U.S. 600, 610-11 (1974) (discussing distinction between criminal trial and appeal).

constitutional rights." *Engle*, 456 U.S. at 128. Among the many applicable constitutional rights, the Sixth Amendment right to effective assistance of counsel serves to ensure a fair and reliable trial.[3] The main event is also the primary forum for the State to exercise its sovereign authority to enforce its criminal laws. *See McCleskey v. Zant*, 499 U.S. 467, 491 (1991); *see also Engle*, 456 U.S. at 128; *Palmore v. United States*, 411 U.S. 389, 402 (1973).

The State criminal justice process provides several opportunities for the question of guilt or innocence to be considered during the "main event" and on direct review. This typically includes:

(a) a motion for entry of judgment of acquittal, at the close of the prosecution's case in chief, *see, e.g.*, Cal. Penal Code § 1118.1;

(b) a motion for entry of judgment of acquittal for insufficient evidence, at the close of all the evidence, *id.*;

(c) the verdict of the jury (or fact finder);

(d) after a verdict, a motion for new trial on the basis of newly discovered evidence, *id.* § 1181(8); and

(e) on direct appeal, often to both an intermediate state court and the state supreme court.

There is a substantial societal interest in trying to resolve all questions of guilt or innocence at the main event or on direct review, given the high concentration of resources by the State and defense during these stages and the recent proximity in time to the facts of the case.

As in the matter at bar, federal miscarriage of justice claims typically arise several years after the conviction

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[3] *See, e.g., Lockhart v. Fretwell*, 506 U.S. ___, 113 S.Ct. 838, 844, 122 L.Ed.2d 180, 191 (1993) (noting prejudice prong of ineffective assistance of counsel claim "focusses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair"); *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (noting adversarial role of counsel "is critical to . . . produce just results" and "to ensure that the trial is fair").

became presumptively valid and final. *See, e.g., Brecht v. Abrahamson*, 507 U.S. ___, 113 S.Ct. 1710, 1719-20, 123 L.Ed.2d 353 (1993) (discussing presumptively final and valid state court conviction and sentence); *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983) (same). In this case, the presumption of innocence ended more than eight and a half years ago upon the conclusion of a fair trial and jury conviction. *See Herrera*, 113 S.Ct. at 860. The state court conviction and sentence became presumptively final and valid more than seven years ago, when this Court denied certiorari review and the direct review process concluded. *See Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987) (discussing conclusion of direct review process).

B. The Ability Of States To Establish State Post-Conviction Avenues To Consider Newly Discovered Claims Of Innocence May Be Jeopardized By The Standard Adopted In This Case

As a matter of state law, all 50 States have recognized the importance of, and have adopted procedures for the consideration of, post-conviction claims of newly discovered evidence in appropriate circumstances. In effect, this furnishes what may be considered as "a kind of [state criminal justice system] 'safety valve' for the 'extraordinary case' " where factual evidence of innocence could not be considered during the "main event." *Harris v. Reed*, 489 U.S. 255, 271 (1989) (O'Connor, J., concurring). These state remedies typically include: (1) a new trial motion; (2) one or more post-conviction (or state habeas) petitions; and (3) clemency. *See* Appendix A (listing current State practices); *see generally Herrera*, 113 S.Ct. at 865-69 & nn.8-11, & 14 (same).

Several criminal justice interests for the State are advanced by these post-conviction avenues. They include the opportunity to protect the integrity of their processes; correct any errors in State proceedings; apply independent State grounds for resolution; entertain, in the first instance, the enforcement of State substantive criminal laws; and provide

an appropriate "safety valve," permitting potentially meritorious claims of innocence to be considered where warranted. In addition to advancing the substantial state interest in finality, these State mechanisms and rules also "channel[] . . . the resolution of [these] types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently." *Reed v. Ross*, 468 U.S. 1, 10 (1984).

Sensitive to these criminal justice concerns, these state post-conviction avenues for relief are available only under appropriate circumstances. For example, as an initial opportunity for post-conviction relief, forty-one States require that a motion for new trial based on newly discovered evidence be filed within a specified time period, which is similar to the federal counterpart.[4] As a matter of state law, many States have modeled their motion for a new trial standard on the

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[4] *See Herrera*, 113 S.Ct. at 865-66; *see also* Appendix A. For nearly fifty years, a two-year limit has applied to motions for a new trial in all federal criminal cases. *See Herrera*, 113 S.Ct. at 865 (discussing history of Fed. R. Crim. P. 33). In at least 15 States, the period for filing a motion for new trial based on newly discovered evidence is longer than for a motion for a new trial based on other grounds, providing an even greater "safety valve" for the consideration of these claims. *See* Appendix A (listing statutes for Alaska, Colorado, Idaho, Iowa, Kansas, Louisiana, Maine, Maryland, Nebraska, Nevada, New Jersey, New Mexico, Ohio, Pennsylvania, and Rhode Island). As the Connecticut Supreme Court recently noted, the jurisdictional time limit to bring a motion for a new trial based on newly discovered evidence "is the product of the legislature's balancing of the interests" at stake and reflects "wise public policy to minimize that degree of unreliability [of stale evidence] by barring the fact-finding process after the applicable limitations period." *Summerville v. Warden*, 229 Conn. 397, 426, 427 (Conn. 1994); *see also Snow v. State*, 105 Nev. 521, 524, 779 P.2d 96 (Nev. 1989) ("[B]ecause the state has the burden of proof in a criminal trial, the prospect of trying a case without access to all of the evidence which was available originally is especially oppressive on the state, and accordingly, the state's interest in maintaining a statute of limitations on the bringing of motions for a new trial is substantial.").

same multi-part test employed in federal criminal cases. *Compare* Appendix A (listing state cases) *with* Appendix B (listing federal cases). Among other things, this standard requires a showing that the newly discovered evidence would "probably result in a different verdict" (or would "probably produce an acquittal"). It also allows a trial court to consider in a timely manner new evidence in light of that which was introduced at trial.

After the deadline for filing a motion for a new trial, in several States a state court may consider other post-conviction relief based on newly discovered evidence at any time. Some of these States allow such post-conviction review only after heightened standards are satisfied. This higher threshold standard, as a matter of state law, respects the State's interest in obtaining finality; encourages the timely filing of motions for new trial; and furnishes an additional "safety valve" which ensures that truly meritorious claims of innocence may be considered at any time.

In California, for example, a defendant may pursue a state habeas claim of newly discovered evidence *at any time*. To obtain post-conviction relief on a claim concerning the guilt-innocence stage of a capital case, the petitioner must point to evidence which "undermine[s] the entire prosecution case and point[s] unerringly to innocence or reduced culpability." *People v. Gonzalez*, 51 Cal.3d 1179, 1246, 800 P.2d 1159 (Cal. 1990), *cert. denied*, 112 S.Ct. 117 (1991); *see also In re Clark*, 5 Cal.4th 750, 766, 855 P.2d 729, 739 (Cal. 1993). Similarly, in Texas, state habeas relief will be granted when the petitioner shows that "based on the newly discovered evidence and the entire record before the jury that convicted him, no rational trier of fact could find proof of guilt beyond a reasonable doubt." *State of Texas ex rel. Holmes v. Court of Appeals for the Third District*, No. 71,764, slip op. at 17 (Apr. 20, 1994). Other States, including Connecticut, also permit similar state post-conviction relief to be brought at any time after a higher showing for relief has been made. *See* Appendix A. These examples illustrate the unique post-conviction procedures, many long-established, which the

States have developed to furnish state "safety valve" mechanisms which do not disrupt other features of their criminal justice systems.

Finally, clemency may be considered the broadest potential "safety valve" for affording relief in criminal proceedings as it does not usually include the strict evidentiary or threshold standards which apply in state court. *See, e.g.*, Ariz. Rev. Stat. § 31-402 (Arizona Board of Executive Clemency may consider any information before making its recommendation to the Governor). Clemency has been recognized as "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera*, 113 S.Ct. at 866; *see also Whitaker v. State*, 451 S.W.2d 11, 15 (Mo. 1970) (newly discovered evidence of innocence is cognizable in a clemency proceeding). In fact, in this case the Governor previously appointed a commission to review the significance of the newly discovered evidence submitted by the petitioner. *See* Respondent's Brief (Statement of Facts, § E).[5]

The delicate State interests and state post-conviction avenues identified above may be directly affected by the federal habeas miscarriage of justice standard applied in this case. *See, e.g., Sumner v. Mata*, 449 U.S. 539, 547, 550 (1981) (discussing inherent "friction" resulting from overlapping judicial systems). For example, a lenient federal standard may invite belated claims of innocence which would not otherwise be filed, or may even encourage state prisoners to bypass these settled state post-conviction mechanisms.

A permissive federal standard may also require States to litigate claims of newly discovered evidence of innocence *twice*: If a state prisoner does not obtain relief in state court, the same or similar claim will likely be filed in federal court. For example, the *Kuhlmann* "fair probability" standard for

[5] Other unique state post-conviction remedies may also be available. For example, a prosecutor could apply for a post-trial entry of a nolle prosequi if the prosecutor believes the prisoner's actual innocence is established.

federal habeas miscarriage of justice claims, advocated by the petitioner, is strikingly similar to the "probably result in a different verdict" standard used in federal or state motions for new trial. If such a similar standard is adopted for miscarriage of justice claims, *amici* are concerned that in light of existing state post-conviction remedies, a motion for a new trial filed in state court may be converted into a mere " 'tryout on the road' for what will later be the determinative federal habeas hearing." *Wainwright*, 433 U.S. at 90. Not only would such an equivalence in state and federal standards create greater tension resulting from overlapping judicial systems, it would also disregard the significant distinction that a motion for new trial must be filed close in time to the original trial, whereas miscarriage of justice claims, as here, are usually filed several years after the trial. For these reasons, significant federalism concerns are raised in this case concerning the ability of States to design their own criminal justice systems which permit consideration of post-conviction claims of newly discovered evidence of innocence. *See, e.g., Cabana v. Bullock*, 474 U.S. 376, 386-87 (1986) (noting "[t]he State has considerable freedom to structure its capital sentencing system as it sees fit"); *Spaziano v. Florida*, 468 U.S. 447, 464 (1984).[6]

[6] The amicus brief of Five Innocent Former Death Row Inmates and Centurion Ministries cannot stand for the proposition that federal miscarriage of justice claims should be freely available for review in federal court. None of the cases cited in the amicus brief involved federal miscarriage of justice claims. Unlike the matter at bar, the only federal habeas case cited in the brief involved a *first* petition and a *proven independent constitutional violation*. Most significantly, all other cases of innocence referred to in the brief were resolved in state court; federal habeas review was unnecessary in these cases.

C. The "Significant Costs" Of The Federal Habeas Review Process And "The Background Norm Of Procedural Regularity Binding On The Petitioner"

In contrast to the primary role of the "main event" in our criminal justice system, federal habeas review serves a "secondary and limited" function. *Barefoot*, 463 U.S. at 887. Appropriately, the petitioner holds the burden to establish that habeas relief is warranted, since the petitioner is no longer presumed innocent, and the State must now defend against this civil challenge to the presumptively final and valid criminal conviction and sentence. Consistent with this responsibility, this Court's habeas jurisprudence "impl[ies] a background norm of procedural regularity binding on the petitioner." *McCleskey*, 499 U.S. at 490. A state prisoner must fulfill certain obligations before federal habeas review may be invoked, including, as discussed below, the *additional "gateway" or threshold showings* required under both the procedural default and miscarriage of justice doctrines.

As this Court has often recognized, "significant costs" are imposed on our criminal justice system from this secondary and limited collateral review, even during consideration of a first habeas petition.[7] Many of these costs have already been incurred in this case during consideration of the first habeas petition. As an example of the significant costs of collateral review, the enforcement of the presumptively final and valid state court judgment is suspended pending final resolution of the collateral attack. *See In re Blodgett*, 503 U.S. ___, 112 S. Ct. 674, 676, 116 L.Ed.2d 669 (1992) (per curiam); *see also Engle*, 456 U.S. at 126-28. Victims of the crime – and their family members and friends – cannot attain closure until there is finality. *See generally Coleman*, 501

[7] *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 2563, 115 L.Ed.2d 640 (1991) (citation omitted); *McCleskey*, 499 U.S. at 490-91 (also quoted in *Sawyer*, 112 S.Ct. at 2518); *Engle*, 456 U.S. at 126; *see also Murray v. Carrier*, 477 U.S. 478, 487 (1986) (discussing "considerable costs" of habeas review).

U.S. at ___, 111 S.Ct. at 2563 (discussing finality interest); *McCleskey*, 499 U.S. at 491 (same). The deterrence and rehabilitation objectives of state criminal law are undermined by this delay. *See, e.g., Kuhlmann v. Wilson*, 477 U.S. 436, 452-53 & n.14 (1986) (plurality opinion) (deterrence); *Engle*, 456 U.S. at 127 n.32 (deterrence and rehabilitation). Moreover, the costs of retrial to the State and society may be prohibitively high, since the "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible," and may in fact "reward the accused with complete freedom from prosecution." *Engle*, 456 U.S. at 127-28; *see also McCleskey*, 499 U.S. at 491; *Kuhlmann*, 477 U.S. at 453 (plurality opinion). Other important interests, which are often impacted by federal habeas review, include the criminal justice interests in judicial economy and in "channel[ing] the resolution of the claim to the most appropriate forum." *Keeney v. Tamayo-Reyes*, ___ U.S. ___, 112 S.Ct. 1715, 1718, 118 L.Ed.2d 318 (1992).

D. The Cause And Prejudice Exception And The Additional Showing Requirement To Justify Review On The Merits

The significant costs of federal habeas review already identified are multiplied and exacerbated during consideration of a second or subsequent habeas petition. Of course, the longer the delay, the greater is "the potential for prejudice to the State."[8] This Court has often noted that on a second or subsequent habeas petition special "sandbagging" concerns may be implicated, depriving the state courts of an opportunity to consider the claims in the first instance. *See McCleskey*, 499 U.S. at 467-68; *Carrier*, 477 U.S. at 491-92;

[8] *Blodgett*, 112 S.Ct. at 676, 116 L.Ed.2d at 674 (per curiam); *see also McCleskey*, 499 U.S. at 492 ("If reexamination of a conviction in the first round of federal habeas stretches resources, examination of new claims raised in a second or subsequent petition spreads them thinner still.").

Engle, 456 U.S. at 129 n.34; *Reed*, 468 U.S. at 14; *Wainwright*, 433 U.S. at 89-90.

Before the merits of a constitutional violation presented in a habeas claim may be considered on a second or subsequent petition, the "background norm of procedural regularity" requires a petitioner to make an *additional showing* beyond that required on a first petition.[9] A subsequent petition will be considered on the merits only *after* the petitioner establishes *both* "*cause* for the noncompliance" with regular procedures and "*actual prejudice* resulting from the alleged constitutional violation."[10]

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[9] As this Court has recognized, "If federal habeas review of capital sentences is to be at all rational, *petitioner must show something more* in order for a court to reach the merits of his claims on a successive habeas petition then he would have had to show to obtain relief on his first habeas petition." *Sawyer v. Whitley*, 505 U.S. ___, 112 S.Ct. 2514, 2522, 120 L.Ed.2d 269 (1992) (emphasis added); *see also id.* 112 S.Ct. at 2522 n.13. Consistent with the "background norm of procedural regularity," for example, the procedural default and abuse of the writ doctrines:

> impose on petitioners a burden of reasonable compliance with procedures designed to discourage baseless claims and to keep the system open for valid ones; both recognize the law's interest in finality; and both invoke equitable principles to define the court's discretion to excuse pleading and procedural requirements for petitioners who could not comply with them in the exercise of reasonable care and diligence. . . . [These doctrines] are both designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time; and both doctrines seek to vindicate the State's interest in the finality of its criminal judgments.

McCleskey, 499 U.S. at 493.

[10] *Wainwright*, 433 U.S. at 84 (emphasis added). The "cause and prejudice" standard also applies to procedurally defaulted claims, *id.*; successive petitions, *Kuhlmann*, 477 U.S. at 451 (plurality opinion); claims considered under the abuse of the writ doctrine, *McCleskey*, 499 U.S. at 490-91; and requests to excuse the failure to develop a material fact in state court hearings. *Keeney*, 112 S.Ct. at 1719.

The cause and prejudice bar represents an "accommodation between . . . competing concerns,"[11] and is formulated in light of the criminal justice interest in "the finality of state judgments of conviction, and the significant costs of federal habeas review." *Sawyer*, 112 S.Ct. at 2518 (internal quotation marks and citations omitted); *see also Carrier*, 477 U.S. at 487. The standard is also predicated in substantial part upon the Sixth Amendment "safeguard [of] the right to effective assistance of counsel."[12]

The cause and prejudice requirement appropriately focuses on the petitioner's conduct in presenting the claim at the earliest opportunity. *See, e.g., McCleskey*, 499 U.S. at 486 (noting "both the abuse-of-the-writ doctrine and our procedural default jurisprudence concentrate on a *petitioner's acts* to determine whether he has a *legitimate excuse* for failing to raise a claim at the appropriate time") (emphasis added); *see also id.* at 498. Consequently, the "cause" standard requires a showing of "something *external* to the petitioner, something that cannot fairly be attributed to him[.]" *Coleman*, 111 S.Ct. at 2566 (emphasis in original); *see also Keeney*, 112 S.Ct. at 1721 n.5.

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[11] *Keeney*, 112 S.Ct. at 1718; *see also Coleman*, 111 S.Ct. at 2567 (discussing "allocation of costs" and burden imposed on petitioner under procedural default doctrine); *Reed*, 468 U.S. at 11 (noting "competing concerns . . . embodied in the 'cause and prejudice' requirement").

This standard, based upon 28 U.S.C. § 2244(b), also reflects the fact that since 1966 the federal habeas statute "establishe[d] a 'qualified application of the doctrine of res judicata' " to address the problem of repetitive petitions. *McCleskey*, 499 U.S. at 486 (quoting S. Rep. No. 1797, 89th Cong., 2d Sess., 2 (1966)).

[12] *Carrier*, 477 U.S. at 496 (noting this "safeguard" assists in the formulation of a procedural default standard); *see also Smith*, 477 U.S. at 539 (noting burden of establishing cause and prejudice is not satisfied where, *inter alia*, "the defendant was represented by competent counsel"). In fact, a showing of ineffective assistance of counsel establishes "cause." *See, e.g., Coleman*, 501 U.S. at ___, 111 S.Ct. at 2567; *Carrier*, 477 U.S. at 488.

E. The "Narrow" Exception to the Cause and Prejudice Exception: The Miscarriage of Justice Standard

Even when the cause and prejudice exception is not met, as in the matter at bar, *see Schlup*, 11 F.3d at 739, the miscarriage of justice exception may still allow review on the merits of a constitutional claim. This standard is recognized as a "*narrow* exception to the cause-and-prejudice requirement."[13] Recognizing the necessarily restricted availability of this exception, this Court has consistently rejected proposed definitions for the miscarriage of justice exception which "would turn the case in which an error results in a fundamental miscarriage of justice, the 'extraordinary case,' into an all too ordinary one."[14]

Like the cause and prejudice standard, the miscarriage of justice exception is also founded on the interest in finality. *See Sawyer*, 112 S.Ct. at 2522. This Court has also "emphasized that the miscarriage of justice exception is concerned

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[13] *Keeney*, 112 S.Ct. at 1721 (emphasis added); *Harris*, 489 U.S. at 271 (O'Connor, J., concurring). This Court has repeatedly stressed the "narrow scope" of this exception. *See Sawyer*, 112 S.Ct. at 2519; *id.* at 2520; *McCleskey*, 499 U.S. at 494; *id.* at 502; *Dugger v. Adams*, 489 U.S. 401, 412 n.6 (1989); *Carrier*, 477 U.S. at 496; *Kuhlmann*, 477 U.S. at 454 (plurality opinion).

[14] *Dugger*, 489 U.S. at 412 n.6 (citation omitted); *see also Sawyer*, 112 S.Ct. at 2522 (noting any standard employed cannot "so broaden the inquiry as to make [the standard] anything but a 'narrow' exception to the principle of finality which we have previously described it to be"); *Dugger*, 489 U.S. at 412 n. 6 (rejecting contention that miscarriage of justice is established where (a) "there is a substantial claim that the constitutional violation undermined the accuracy of the sentencing decision" or (b) trial court "found an equal number of aggravating and mitigating circumstances") (citation omitted); *Antone v. Dugger*, 465 U.S. 200, 206 (1984) (per curiam) (noting the miscarriage of justice exception is not "served by reconsideration of those claims previously presented on federal habeas"); *Engle*, 456 U.S. at 135 (rejecting "a plain-error standard").

with actual as compared to legal innocence."[15] The standard also contemplates "an additional safeguard against miscarriages of justice in criminal cases" which "is the right to effective assistance of counsel."[16]

Just as the cause and prejudice standard interposes an additional showing before the merits of the habeas claim may be considered, so too does the miscarriage of justice exception establish a threshold "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera*, 113 S.Ct. at 862. In *Sawyer*, this Court clarified this gateway requirement, holding that "to show 'actual innocence' one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable State law. 112 S.Ct. at 2517. In the death penalty context, this showing may include "innocence of the capital crime itself" or "a showing that there was no aggravating circumstance or that

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[15] *Sawyer*, 112 S. Ct. at 2519 (citation omitted); *see also Kuhlmann*, 477 U.S. at 454 n.17 (plurality opinion) ("[T]he question whether the prisoner can make the requisite showing must be determined by reference to *all* probative evidence of guilt or innocence.") (emphasis in original) (citation omitted); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 160 (1979) ("A defendant would not bring himself within [the miscarriage of justice exception] by showing that he might not, or even would not, have been convicted in the absence of evidence claimed to have been unconstitutionally obtained.") [hereinafter *Friendly*].

[16] *Carrier*, 477 U.S. at 496. The fundamental role of the Sixth Amendment concerning issues raised on federal habeas review cannot be overlooked. As already noted, the Sixth Amendment operates not only at the "main event," but also under the cause and prejudice and miscarriage of justice standards. *See* notes 3 & 12, and accompanying text, *supra*. Just as "[t]he presence of such a safeguard may properly inform this Court's judgment in determining what standard should govern the exercise of the habeas court's equitable discretion with respect to procedurally defaulted claims," *Carrier*, 477 U.S. at 496 (internal quotation marks and citation omitted), so too may this constitutional standard guide the Court's definition and application of the miscarriage of justice exception. *See id.*

some other condition of eligibility had not been met." *Id.* at 2522. Once this threshold or "gateway" showing has been made to justify federal habeas review on a second or subsequent petition, habeas relief is still not warranted until a violation of a constitutional right can be established.[17]

F. Summary: This Case Does Not Come Before the Court On A Clean Slate

The federal miscarriage of justice "safety valve" serves an important role in our criminal justice system but should be carefully confined to appropriate cases, consistent with its "narrow" scope. This exception should not be used to disrupt the interest in finality or to undermine or disparage the state criminal justice system, including what should be the "main event," or state post-conviction (or "safety valve") mechanisms for reviewing newly discovered evidence of innocence.[18] As this Court has already observed, "most of the

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[17] *See Herrera*, 113 S.Ct. at 862-63 ("We have never held that [the miscarriage of justice exception] extends to freestanding claims of actual innocence."); *Kuhlmann*, 477 U.S. at 454 (plurality opinion) (noting colorable showing of factual innocence "supplements [the prisoner's] constitutional claim"); *see also McClesky*, 499 U.S. at 495; *Townsend v. Sain*, 372 U.S. 293, 317 (1963); *Moore v. Dempsey*, 261 U.S. 86, 88 (1923).

Moreover, *any* habeas relief may be granted only when a violation of federal rights has been established. *See* 28 U.S.C. § 2254(a); *see also Estelle v. McGuire*, 502 U.S. ___, 112 S.Ct. 475, 116 L.Ed.2d 385, 396 (1991) ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."); *Engle*, 456 U.S. at 119 (same). Further, this Court has repeatedly noted that "federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." *Smith v. Phillips*, 455 U.S. 209, 221 (1982); *see also Chandler v. Florida*, 449 U.S. 560, 570 (1981).

[18] Repetitive or liberal review of state court criminal judgments undermines confidence in the main event, the state court system, and important state criminal justice interests. *See, e.g., Herrera*, 113 S.Ct. at 874 (O'Connor, J., concurring) ("At some point in time, the State's interest in finality must outweigh the prisoner's interest in yet another round of

price paid for federal review of state prisoner claims is paid by the States." *Coleman*, 501 U.S. at ___, 111 S.Ct. at 2559.

In light of the substantial cost of collateral review on a second or subsequent petition, a habeas petitioner, consistent with the background norm of procedural regularity, should sustain a heavy burden to justify review under the miscarriage of justice exception. Otherwise this narrow exception (which already constitutes an exception to the cause and prejudice exception) may be used to swallow the general rule prohibiting review of subsequent petitions.

Significantly, this case does not come before this Court on a clean slate. If this Court could assume *arguendo* federal habeas relief may be warranted in the absence of a showing of an independent constitutional violation where there is "no state avenue open to process . . . a claim" of actual innocence, *Herrera*, 113 S.Ct. at 869, then it follows that the federal miscarriage of justice standard should similarly be sensitive to state post-conviction remedies. This Court has previously noted that "[i]ssuance of a habeas writ . . . exacts an extra charge by undercutting the State's ability to enforce its procedural rules." *Engle*, 456 U.S. at 129. As discussed above, these concerns equally apply to state post-conviction remedies developed to consider newly discovered evidence of innocence.

II. The *Sawyer* Standard Should Be Maintained For Guilt-Innocence Stage Claims

The petitioner argues that the "somewhat lower" *Kuhlmann* standard should govern guilt-innocence stage

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litigation."); *McCleskey*, 499 U.S. at 492 ("Perpetual disrespect for the finality of convictions disparages the entire criminal justice system."); *Engle*, 456 U.S. at 127 ("Liberal allowance of the writ . . . degrades the prominence of the trial itself."); *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring in result) ("It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.").

claims. Petitioner's Brief, at 29. For at least six reasons, the *Sawyer* standard should be maintained for guilt-innocence stage claims.

First, the *Sawyer* definition of the miscarriage of justice exception expressly included showings concerning "innocence of the capital crime itself." *Sawyer*, 112 S.Ct. at 2522. In fact, each of the three possible standards considered by the *Sawyer* Court embraced the elements of the offense.[19] The differences among the three standards focused solely on whether, and how, aggravating and mitigating circumstances should be considered. Consequently, the *Sawyer* standard already countenances an inquiry involving guilt-innocence stage claims that "the wrong person of the crime" may have been convicted. *Id.* at 2519.

Second, and concomitantly, this Court applied the *Sawyer* standard to a claim which went to "*both* [the] petitioner's guilt or innocence of the crime of first-degree murder, and the aggravating circumstance of a murder committed in the course of an aggravated arson." *Id.* at 2524 (emphasis added). At least one federal court has already noted this application of

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[19] Of the three definitions considered by the *Sawyer* Court,
(1) "The strictest definition," proposed by the Solicitor General, "would be to limit any showing to *the elements of the crime* which the State has made a capital offense," *Sawyer*, 112 S.Ct. at 2521 (emphasis added);
(2) "The most lenient" standard, submitted by the petitioner, "would be to allow the showing of [a miscarriage of justice] to extend not only to *the elements of the crime*, but also to the existence of aggravating factors, and to mitigating evidence which bore, not on the defendant's eligibility to receive the death penalty, but only on the ultimate discretionary decision between the death penalty and life imprisonment," *id.* (emphasis added);
(3) Finally, a "middle ground" test proposed a focus on the state law elements which made the petitioner eligible for the death penalty, which necessarily included the elements of the crime. *Id.* at 2522-23.

the *Sawyer* standard. *See McCoy v. Lockhart*, 969 F.2d 649, 651 & n.4 (8th Cir. 1992).

Third, the *Sawyer* standard affords appropriate respect for the role of State post-conviction remedies based on newly discovered evidence. In contrast, a lenient or "lower" miscarriage of justice standard may disregard vital state interests advanced by these post-conviction remedies, and may encourage reexamination on federal habeas review of similar issues previously presented during a motion for a new trial in state court. *See* Section I(B), *supra* (comparing standards). For example, as already noted, the *Kuhlmann* "fair probability" standard is lower than California's *Gonzalez* standard for granting post-conviction relief based on newly discovered evidence. These claims are raised at the guilt-innocence stage and may be brought at any time. In contrast, the *Sawyer* standard is substantially similar to the *Gonzalez* test. The "clear and convincing evidence" standard in *Sawyer* ensures, as a threshold matter, that a truly meritorious evidentiary showing is made. In addition, it serves to screen out cumulative evidence or unreliable recantations. In this manner the *Sawyer* standard is similar to the motion for new trial standard employed in most States. *See* Appendix A; *compare also State v. Coogan*, 453 N.W.2d 186, 188 (Wis. Ct. App. 1990) (noting "defendant must establish his right to a new trial by clear and convincing evidence," under Wis. Stat. Ann. § 974.06 (state post-conviction provision)). The *Kuhlmann* standard, as advocated by petitioner, does not contain similar protections.

Fourth, the application of finality and comity concerns that have been repeatedly recognized by this Court should not be contingent on whether the petitioner presents a guilt-innocence or sentencing stage claim. The *Sawyer* standard is predicated upon, and best serves, these important criminal justice interests. *See, e.g., Sawyer*, 112 S.Ct. at 2522. While the petitioner expressly acknowledges that the *Kuhlmann* standard employs a "lower burden of proof" than the *Sawyer* standard, he fails to ensure that the interests in finality and comity, implicated by a second habeas petition, are adequately and similarly protected. *See* Petitioner's Brief, at 29.

Disparate results under the interest in finality would occur if the "clear and convincing" *Sawyer* standard were applied to sentencing stage claims, while a "fair probability" standard governed guilt-innocence claims. On a second or subsequent habeas petition, the state interest in finality and comity is the *same* regardless of whether the claim concerns the guilt-innocence or the sentencing stage.

Fifth, other federal courts have applied the *Sawyer* standard to guilt-innocence stage claims.[20] As lower courts have recognized, the *Sawyer* standard simply "clarified" the *Kuhlmann* standard, which was announced but not applied in a plurality opinion.[21] Until *Sawyer*, this Court did not have

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[20] *See Spencer v. Murray*, 18 F.3d 229, 236 (4th Cir. 1994); *Cornell v. Nix*, 976 F.2d 376, 381 (8th Cir. 1992) (en banc), *cert. denied*, 113 S.Ct. 1820 (1993) (citing *McCoy*, 969 F.2d at 651); *see also Williams v. Whitley*, 994 F.2d 226, 233 n.3 (5th Cir.), *cert. denied*, 114 S.Ct. 608 (1993) (noting "we have no doubts about the Court's opinion in *Sawyer*"). Those lower courts which have suggested the potential application of the *Sawyer* or *Kuhlmann* standard ultimately denied habeas relief, concluded application of either standard did not affect the outcome of the case. *See Epperly v. Booker*, 997 F.2d 1, 10 (4th Cir.), *cert. denied*, 114 S.Ct. 611 (1993); *Williams*, 994 F.2d at 233 n.3 (noting the "petition would be dismissed as successive under *Kuhlmann* as well"); *see also Campbell v. Blodgett* 997 F.2d 512, 524 n.15 (9th Cir. 1992) (noting "Campbell fails to meet our prior, more lenient standard as well," which was overruled in *Sawyer*, 112 S.Ct. at 2521 & n.11), *cert. denied*, 114 S.Ct. 1337 (1994). Other lower courts have noted the two different standards without any substantive discussion and ultimately denied habeas relief. *See Montoya v. Collins*, 988 F.2d 11, 13 (5th Cir.) ("He has not even alleged, much less demonstrated, that a 'miscarriage of justice' regarding actual innocence or 'actual innocence of the death penalty' could be established in his case."), *cert. denied*, 113 S.Ct. 1630 (1993); *Campbell*, 997 F.2d at 524-25 (noting petitioner "has expressly disclaimed any attempt to meet" the miscarriage of justice exception).

[21] *See, e.g., Blair v. Armontrout*, 976 F.2d 1130, 1135 (8th Cir. 1992) (discussing "the *Kuhlmann* actual innocence standard, as clarified by *Sawyer*"), *cert. denied*, 113 S.Ct. 2357 (1993); *Cornell*, 976 F.2d at 381 (noting the U.S. Supreme Court "refined the 'actual innocence' standard" in *Sawyer*).

many opportunities to explain or apply the miscarriage of justice exception. As recently as 1989, "actual innocence of the death penalty" remained undefined. *Dugger*, 489 U.S. at 412 n.6.

Sixth, the application of the *Sawyer* standard to both the guilt-innocence and sentencing stages promotes certainty and uniformity in habeas jurisprudence. *See, e.g., Keeney*, 112 S.Ct. at 1720 (noting objective to "advance[] uniformity in the law of habeas corpus"); *McCleskey*, 499 U.S. at 496 (discussing interests in "certainty and stability"). In other cases, the same substantive standard for the actual innocence exception has been applied in capital and non-capital habeas cases and to guilt-innocence and sentencing stage claims. *See e.g., McCoy*, 969 F.2d at 651-52 (listing cases). Analogously, in *Sawyer*, this Court advanced similar interests in uniformity by adopting one standard for "successive, abusive, or defaulted" federal habeas petitions. *Sawyer*, 112 S.Ct. at 2517. Similarly, this Court has also "reject[ed] the suggestion that the [cause and prejudice] principles . . . apply differently depending on the nature of the penalty a state imposes for the violation of its criminal laws." *Smith*, 477 U.S. at 538, or on the constitutional claim asserted. *Engle*, 456 U.S. at 129.

III. Assuming *Arguendo* The *Sawyer* Standard Is Not Applied, An Alternative Threshold Showing Should Contain Other Attributes And Safeguards To Protect The Narrow Application Of The Miscarriage of Justice Exception

Assuming *arguendo* this Court declines to apply the *Sawyer* standard to guilt-innocence stage claims, several considerations may influence an alternative miscarriage of justice standard, as discussed below:

For several cases before and after *Kuhlmann*, the contours of the miscarriage of justice exception remained undefined. *Compare Engle*, 456 U.S. at 135; *Wainwright*, 433 U.S. at 91, *with Dugger*, 489 U.S. at 412 n. 6; *Smith*, 477 U.S. at 537-38.

A. Pursuit Of State Post-Conviction Remedies Should Be Encouraged

A federal miscarriage of justice standard should encourage pursuit of state post-conviction avenues for presenting claims of newly discovered evidence of innocence. *Cf. Herrera*, 113 S.Ct. at 869 (assuming *arguendo* federal habeas relief would be warranted "if there were no state avenue open to process" a post-conviction claim of "a truly persuasive demonstration of 'actual innocence' "); *id.* at 874 (O'Connor, J., concurring) (suggesting federal habeas review of claims of actual innocence should be "reserved for extraordinarily high and truly persuasive demonstrations of actual innocence *that cannot be presented to state authorities*") (emphasis added; internal quotation marks, brackets and citation omitted). Such a rule would advance several of the state criminal justice interests which have already been noted, *see* Section I(B), *supra*, and, where applicable, would provide state courts with an opportunity to make findings of fact that would be entitled to a presumption of correctness on federal habeas review. *See* 28 U.S.C. § 2254(d).

B. The Threshold Level Should "Necessarily Be Extraordinarily High" To Promote Finality; Avert A "Deluge" Of Frivolous Claims; And Screen Out Manufactured, Untrustworthy, Or Cumulative Claims

This Court has aptly recognized, in a related context, that in light of "the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would *necessarily be extraordinarily high*." *Herrera*, 113 S.Ct. at 869 (emphasis added). This concern for a sufficiently high threshold to screen out unmeritorious claims has been echoed by

others, including Justice O'Connor and Judge Friendly.[22] As already noted, the *Sawyer* "clear and convincing evidence" standard appropriately serves this function as well as the interest in finality.

The miscarriage of justice standard, as a threshold "gateway," should also protect against consideration of perjured evidence or uncorroborated, recanted testimony, or manufactured claims of innocence. Such evidence has regrettably become all too common and is frequently submitted during the eleventh hour of litigation.[23] As Justice O'Connor has

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[22] *See Herrera*, 113 S.Ct. at 874 (O'Connor, J., concurring) (Unless federal habeas review is "reserved for extraordinarily high and truly persuasive demonstrations of actual innocence that cannot be presented to state authorities, the federal courts will be *deluged with frivolous claims of actual innocence*.") (emphasis added; internal quotation marks, brackets and citation omitted); *Friendly, supra*, at 150 (The "requirement . . . would enable courts of first instance to screen out rather rapidly a great multitude of applications not deserving their attention and devote their time to those few where injustice may have been done, and would effect an even greater reduction in the burden on appellate courts."); *see also State v. Williams*, 96 Wash.2d 215, 634 P.2d 868, 874 (Wash. 1981) ("[E]ach new trial inevitably leaves new avenues for investigating the facts anew. Hardly a case can be supposed but what, by diligent search, some additional evidence will be found that would, if offered at trial, have been admissible on one theory or another. The mere existence of such evidence does not alone justify the granting of a new trial.").

[23] As this Court has noted in the miscarriage of justice context, where necessary, "efforts on the part of habeas petitioners to delay their filings until the last minute with a view to obtaining a stay because the district court will lack time to give them the necessary consideration before the scheduled execution" will be considered against the petitioner in his or her request for relief. *Sawyer*, 112 S.Ct. at 2520 n.7; *see also Herrera*, 113 S.Ct. at 869 (noting "likelihood of abuse is as great – or greater – here" under miscarriage of justice claims compared to new trial motions); *Gomez v. United States District Court for the Northern District of California*, 503 U.S. ___, 112 S.Ct. 1652, 118 L.Ed.2d 293 (1992) (per curiam); *McCleskey*, 499 U.S. at 490 ("In habeas, equity recognizes that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.") (internal quotation marks and citation omitted).

observed, last-minute affidavits in capital cases concerning newly discovered evidence of innocence should generally "be treated with a fair degree of skepticism." *Herrera*, 113 S.Ct. at 872 (O'Connor, J., concurring). Addressing this problem, many States have built-in similar protections for considering post-conviction relief based upon newly discovered evidence of innocence. For example, some States have established special procedures concerning the consideration of recanted evidence.[24] The *Sawyer* "clear and convincing evidence" standard indirectly screens out similar evidence of questionable reliability.

C. Presumption of Correctness

For at least two reasons, the federal miscarriage of justice standard should include a presumption of correctness which must be overcome. *First*, the State, having marshalled its resources to introduced evidence at trial at a time close to the crime in question, is entitled to such a presumption, which already attaches on the first habeas petition. *See, e.g., Barefoot*, 463 U.S. at 887; *see also Herrera*, 113 S.Ct. at 883 (Blackmun, J., dissenting) (Because the convicted prisoner is no longer entitled to a presumption of innocence, "it is fair to place on him the burden of proving his innocence, not just raising doubt about his guilt."). *Second*, even the *Jackson* sufficiency of the evidence standard requires that the evidence "be considered in the light most favorable to the prosecution." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). If the

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[24] *See, e.g., State v. Perry*, 232 Mont. 455, 758 P.2d 268, 275 (Mont. 1988) ("recanted testimony is to be viewed with great suspicion" and the trial judge should grant a new trial only if "satisfied the recantation of the witness is true") (citation omitted); *State v. Britt*, 320 N.C. 705, 360 S.E.2d 660, 665 (N.C. 1987) (adopting and discussing modified recantation rule under *Larrison v. United States*, 24 F.2d 82, 87-88 (7th Cir. 1928)); *Blankenship v. State*, 447 A.2d 428, 434 (Del. 1982) (special standard for granting new trial based on recanted evidence); *People v. Barbara*, 400 Mich. 352, 255 N.W.2d 171, 174 (Mich. 1977) (recantation testimony "traditionally regarded as suspect and untrustworthy").

State was entitled to such a presumption in a *Jackson* claim, it certainly deserves this presumption on a second or subsequent habeas petition involving a miscarriage of justice claim.

D. Scope of Evidence: Any Newly Discovered Evidence of "Actual" Innocence Should Be Considered Against The Evidence Presented At Trial

The scope of evidence considered for a guilt-innocence stage claim should include all evidence which bears on the question of guilt or innocence. Both the *Kuhlmann* and *Sawyer* standards focus on *actual*, not *legal*, innocence. *See* note 15, *supra*. Similarly, in *Herrera*, each member of the Court agreed that any claim of *newly discovered* evidence of actual innocence should be considered in light of the evidence presented at trial.[25] State post-conviction remedies take a similar approach. *See, e.g., State of Texas ex rel. Holmes*, No. 71,764, slip op. at 17 (Apr. 20, 1994) (for post-conviction relief, petitioner must show that "based on the newly discovered evidence and *the entire record before the jury that convicted him*, no rational trier of fact could find proof of guilt beyond a reasonable doubt") (emphasis added). Any other standard would allow "hot" newly discovered evidence to prevail over "cold" evidence which was originally presented to the jury.

E. Respect For The Fundamental Role Of The Jury Through A Juror-Based Perspective

The jury (or fact finder) is the primary decision maker entrusted in our criminal justice system with determining questions of innocence or guilt. *See generally* note 2, *supra*,

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[25] *See Herrera*, 113 S.Ct. at 870 (noting "the affidavits must be considered in light of the proof of petitioner's guilt at trial"); *id.* at 872-73 (O'Connor, J., concurring); *id.* at 875 (Scalia, J., concurring and "join[ing] the entirety of the Court's opinion"); *id.* (White, J., concurring in the judgment); *id.* at 883 (Blackmun, J., dissenting). As Justice Blackmun noted in dissent, "the stronger the evidence of the prisoner's guilt, the more persuasive the newly discovered evidence of innocence must be." *id.* (Blackmun, J., dissenting).

and accompanying text. Not surprisingly related standards adopted by this and other Courts have respected the central role of the jury in our criminal justice system. For example, the *Sawyer* miscarriage of justice standard provides "but for a constitutional error, *no reasonable juror* would have found the petitioner eligible for the death penalty under the applicable state law."[26] Such a juror-based point of view respects the primary role of the fact finder at the "main event" in our criminal justice system and "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts."[27] Moreover, the jury originally considered the evidence when it was "fresh," before it could become "stale" or unavailable. Analogously, the *Jackson* sufficiency of the evidence standard focuses on whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

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[26] *Sawyer*, 112 S.Ct. at 2517 (emphasis added). The observations of the Washington Supreme Court in the state court context certainly apply to the limited and secondary role of a federal habeas court:

> The granting of a new trial by the trial judge involves the relationship and function of three entities: (1) the trial judge, (2) the jury, and (3) the appellate courts. A fine balance must be struck so that any one entity does not unduly usurp the functions of either of the other two, while still giving each sufficient latitude to fulfill its own legitimate function. . . . [State case law has recognized that] it is an abuse of discretion for a trial court to grant a new trial simply because the judge does not agree with the verdict. . . . [A standard should be rejected which would] virtually inject the trial judge as a thirteenth juror permitting that judicial officer to independently determine credibility and weigh evidence.

Williams, 634 P.2d at 873, 875 (citations and footnote omitted).

[27] *Jackson*, 443 U.S. at 319; *see generally Wright v. West*, 505 U.S. ___, 112 S.Ct. 2482, 2492, 120 L.Ed.2d 225 (1992) (plurality opinion) ("In *Jackson*, we emphasized repeatedly the deference owed to the trier of fact and, correspondingly, the sharply limited nature of constitutional sufficiency review.").

Jackson, 443 U.S. at 319. (emphasis in original). Any other point of view concerning the question of guilt or innocence risks "imping[ing] upon 'jury' discretion." *Id.* In other contexts, this Court has wisely rejected a point of view inquiry based upon the subjective determination of a federal judge.[28] Without a similar jury-based focus, the consideration of newly discovered evidence may be inappropriately disconnected from what actually transpired at the "main event."

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[28] *See Jackson*, 443 U.S. at 318-19 (The *Jackson* sufficiency of the evidence "inquiry does not require a court to ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.") (emphasis in original; internal quotation marks and citation omitted); *id.* at 320 n.13 (The *Jackson* standard "does not permit a [federal] court to make its own subjective determination of guilt or innocence.").

While the *Jackson* analogy is useful to consider, it is important to highlight some distinctions. A *Jackson* inquiry focuses on a constitutional due process violation; the miscarriage of justice standard merely furnishes a "gateway" threshold which must be satisfied before the merits of the constitutional claim may be considered. A sufficiency of the evidence *Jackson* determination may also bar retrial under the Double Jeopardy Clause; relief under the miscarriage of justice exception may actually permit retrial, where, years after the original state trial, evidence remains available. *See Hudson v. Louisiana*, 450 U.S. 40 (1981). Finally, a *Jackson* review concentrates on the sufficiency of the evidence which was actually admitted; a miscarriage of justice claim involves newly discovered evidence which was not introduced in the original trial (which puts it in a similar posture to those state post-conviction remedies allowing consideration of newly discovered evidence of innocence). *See also Herrera*, 113 S.Ct. at 861 (distinguishing *Jackson*).

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the decision of the court below be affirmed.

Dated: July 11, 1994

Respectfully submitted,

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APPENDIX A

STATE POST-CONVICTION REMEDIES FOR CONSIDERING NEWLY DISCOVERED EVIDENCE OF INNOCENCE[1]

ALABAMA

MOTION FOR NEW TRIAL

ALA. CODE § 15-17-5 (1982) (30 day limit); ALA. R. CRIM. P. 24.1 (same); *Young v. State*, 346 So.2d 509, 514 (Ala. Crim. App. 1977) (motion for new trial based on newly discovered evidence requires defendant to show (1) evidence will "probably change the result if a new trial is granted"; (2) evidence discovered since trial; (3) due diligence; (4) material; and (5) not merely cumulative or impeaching)

POST-CONVICTION REMEDIES

ALA. R. CRIM. P. 32.1(e) (post-conviction relief based on newly discovered material facts which require that the conviction or sentence be vacated); *id.* 32.2(c) (petitions filed under Rule 32.1(e) must be filed under applicable 2 year period or within 6 months of discovery of new material facts, whichever is later)

PROCEDURES FOR COMMUTATION, PARDONS OR CLEMENCY

ALA. CONST. art. V, § 124; ALA. CONST. amend. 38; ALA. CODE § 15-18-100 (1982)

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[1] The citations contained in this Appendix have been submitted to each State for verification. Grateful acknowledgement is made to the States furnishing information and materials for this Appendix. Appendix prepared by Jennifer P. Anderson, California Attorney General's Office.

ALASKA

MOTION FOR NEW TRIAL

ALASKA R. CRIM. P. 33 (1983) (2 year limit when motion is based on newly discovered evidence, but if an appeal is pending, motion may be granted only on remand; 5 day limit for all other grounds); *Salinas v. State*, 373 P.2d 512, 514 (Alaska 1962) (standard for granting new trial based on newly discovered evidence: (1) evidence discovered since trial; (2) due diligence; (3) not merely cumulative; (4) material; and (5) "would probably produce an acquittal upon new trial")

POST-CONVICTION REMEDIES

ALASKA R. CRIM. P. 35.1(a)(4) (evidence of material facts exists that was not previously presented and heard, which requires vacation of the conviction or sentence in the interest of justice); *id.* 35.1(c) (no time limit); *Hensel v. State*, 604 P.2d 222, 231 (Alaska 1979) ("defendant has the burden of proving by a preponderance of the evidence that newly discovered evidence would be likely to change the result of the trial – that is, that the evidence is sufficient to create a reasonable doubt as to his guilt"); *id.* at 235 n.55 (noting state's burden in post-conviction proceedings "should, if anything, be less" than in motion for new trial)

CLEMENCY, ETC.

ALASKA CONST. art. III, § 21; ALASKA STAT. §§ 33.20.070 (executive clemency grant of authority), 33.20.080(a) (authorizing Governor to refer applications for clemency to the parole board for investigation and report)

ARIZONA

MOTION FOR NEW TRIAL

ARIZ. R. CRIM. P. 24.1 (10 day jurisdictional limit); *State v. Madsen*, 125 Ariz. 346, 609 P.2d 1046, 1055-54 (motion to vacate judgment based on newly discovered evidence may be brought under ARIZ. R. CRIM. P. 24.2, Rule 32.1(e) standards apply), *cert. denied*, 449 U.S. 873 (1980); *State v. Fisher*, 141 Ariz. 227, 250-51, 686 P.2d 750, 773-74 (standard for granting motion for new trial based on newly discovered evidence under ARIZ. R. CRIM. P. 24.2 or 32.1(e): (1) discovery since trial; (2) due diligence; (3) not merely cumulative or impeaching; (4) material; and (5) would probably change the verdict), *cert. denied*, 469 U.S. 1066 (1984)

POST-CONVICTION REMEDIES

ARIZ. R. CRIM. P. 32.1(e) (post-conviction relief when "newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence"; relief contingent on (1) discovery after trial; (2) due diligence; and (3) evidence cannot be cumulative or

"used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence"); *see also State v. Fisher*, 141 Ariz. 227, 250-251, 686 P.2d 750, 773-774 (standard for granting motion for new trial based on newly discovered evidence under ARIZ. R. CRIM. P. 24.2 or 32.1(e): (1) discovery since trial; (2) due diligence; (3) not merely cumulative or impeaching; (4) material; and (5) would probably change the verdict), *cert. denied*, 469 U.S. 1066 (1984); ARIZ. R. CRIM. P. 32.2(b) (no time limit)

CLEMENCY, ETC.

ARIZ. CONST. art. V, § 5; ARIZ. REV. STAT. ANN. §§ 31-402, 31-443, 31-445 (1986 and Supp. 1992)

ARKANSAS

MOTION FOR NEW TRIAL

ARK. R. CRIM. P. 36.22 (1989) (motions must be filed prior to the time fixed to file a notice of appeal, 30 day limit under ARK. CODE ANN. § 16-91-105); ARK. CODE ANN. § 16-89-130 (1987) (new trial may be granted based upon discovery of important post-verdict evidence, within 30 day limit for filing notice of appeal); *Vasquez v. State*, 287 Ark. 468, 473, 701 S.W.2d 357, 360

(1985) (court considers due diligence; the "probable effect of the testimony" at a new trial; relief is not granted where evidence is merely cumulative or attacks the credibility of a trial witness)

POST-CONVICTION REMEDIES

ARK. R. CRIM. P. 37.2(c) (petition must be filed within 60 days from the date mandate issued by the appellate court or within 90 days from entry of judgment upon a plea of guilty); *Dumond v. State*, 294 Ark. 379, 385, 743 S.W.2d 779, 782 (1988) (per curiam) (a claim of newly discovered evidence is not a cognizable ground for a petition seeking post-conviction relief under ARK. R. CRIM. P. 37.1); *Penn v. State*, 282 Ark. 571, 670 S.W.2d 426, 428 (1984) (writ of error coram nobis based on newly discovered evidence is available for case between trial and appeal where another confesses to the crime, if: (1) there existed some fact which would have prevented the rendering of the judgment had it been known at trial; (2) the evidence was not considered at trial through no negligence or fault of defendant; (3) due diligence and a valid excuse for delay in bringing the petition; (4) full disclosure of specific facts relied upon supporting constitutional violation; and (5) a rebuttable presumption attaches that the judgment of conviction is valid)

CLEMENCY, ETC.

ARK. CONST. art. V, § 11; *id.* art. VI, § 18; ARK. CODE ANN. §§ 5-4-607, 16-93-204 (Supp. 1991);

Sanders v. State, 291 Ark. 200, 723 S.W.2d 370, 372 (1987) (clemency is the exclusive avenue to consider a claim of actual innocence when other post-conviction relief is untimely or unavailable)

CALIFORNIA

MOTION FOR NEW TRIAL

CAL. PENAL CODE § 1181(8) (motion for new trial based on newly discovered evidence; evidence must be material and could not have been discovered with reasonable diligence at trial); *id.* §§ 1182, 1191 (within 20 judicial days after the verdict, before entry of judgment, 10 day extension may be granted to consider motion for new trial); *People v. Delgado*, 5 Cal.4th 312, 19 Cal.Rptr.2d 529, 851 P.2d 811, 820 (1993) (standard for granting motion for new trial based on newly discovered evidence: (1) evidence, and not merely its materiality, must be newly discovered; (2) not merely cumulative; (3) would "render a different result probable on a retrial"; (4) due diligence; and (5) established "by the best evidence of which the case admits")

POST-CONVICTION REMEDIES

CAL. PENAL CODE § 1473 *et seq* (habeas corpus); *id.* § 1502 (no time limit); *People v. Gonzalez*, 51 Cal.3d 1179, 1246, 275 Cal.Rptr 729, 800 P.2d 1159 (1990) (post-conviction petition based on

newly discovered evidence of innocence may be brought at any time and must "cast[] fundamental doubt on the accuracy and reliability of the proceedings"; "At the guilt phase, such evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability" and at the penalty phase must "so clearly change[] the balance of aggravation against mitigation that its omission 'more likely than not' altered the outcome"), *cert. denied*, 112 S.Ct. 117 (1991)

CLEMENCY, ETC.

CAL. CONST. art. V, § 8; CAL. GOVT. CODE § 12030(a)

COLORADO

MOTION FOR NEW TRIAL

COLO. R. CRIM. P. 33(b), 7B COLO. REV. STAT. (1993 Supp.) (motion for new trial based on newly discovered evidence must be "filed as soon after entry of judgment as the facts supporting it become known to the defendant"; motion for new trial based on any other grounds must be filed within 15 days or within such time as the court may fix during the 15 day period); *People v. Jones*, 690 P.2d 866, 869 (Colo. Ct. App. 1984) (standard for granting motion for new trial based on newly discovered evidence: (1) evidence discovered since trial and defendant and

his counsel exercised diligence; (2) evidence is material and not merely cumulative or impeaching; and (3) "would probably produce an acquittal" on retrial)

POST-CONVICTION REMEDIES

COLO. R. CRIM. P. 35(c)(2)(V), 7B COLO. REV. STAT. (1984) (standard for post-conviction relief based on newly discovered evidence: (1) evidence is material; (2) due diligence; and (3) "requires vacation of the conviction or sentence in the interest of justice"); COLO. REV. STAT. ANN. § 16-5-402(1), 8A COLO. REV. STAT. (1986) (time limit for post-conviction challenges on the validity of a judgment: no time limit for class 1 felonies; 3 year limit for all other felonies; 18 months for misdemeanors; 6 months for petty offenses); COLO. REV. STAT. ANN. § 16-5-402(2)(d) (exception to time limits in § 16-5-402(1) includes "justifiable excuse or excusable neglect")

CLEMENCY, ETC.

COLO. CONST. art. IV, § 7; COLO. REV. STAT. §§ 16-17-101, 16-17-102 (1986)

CONNECTICUT

MOTION FOR NEW TRIAL

CONN. GEN. STAT. ANN. § 52-270(a)(West 1991) (motion for new trial based on the discovery of

new evidence); *see also* CONN. PRACTICE BOOK § 904 (same); CONN. GEN. STAT. ANN. § 52-582 (West 1991) (3 year limit); *Taborsky v. State*, 142 Conn. 619, 116 A.2d 433, 435 (1955) (standard concerns "whether it is probable that on a new trial a different result would be reached"); *Reilly v. State*, 32 Conn. Supp. 349, 355 A.2d 324, 329 (Conn. Super. Ct. 1976) (burden on defendant to show: (1) evidence "in fact newly discovered"; (2) material; (3) due diligence; (4) not merely cumulative; and (5) "likely to produce a different result in a new trial"); *Andersen v. State*, 43 Conn. 514, 517 (1876) (in capital case, the interests of "justice and humanity" require the court "to pause and consider" before applying newly discovered evidence standard in all its rigor); *Hamlin v. State*, 48 Conn. 92, 94 (1880) (capital defendant is entitled to "the benefit of a doubt that might be raised" by the newly discovered evidence)

POST-CONVICTION REMDIES

CONN. GEN. STAT. ANN. § 52-466 (West 1991) (no time limit); *Summerville v. Warden*, 229 Conn. 397, 431 (1994) (standard for granting new trial based on newly discovered evidence in a habeas proceeding is "more demanding than a probability of a different result" standard for a motion for new trial); *see also id.* at 439-40 (noting possible standards)

CLEMENCY, ETC.

CONN. CONST. art. IV, § 13; CONN. GEN. STAT. ANN. § 18-26 (1988)

DELAWARE

MOTION FOR NEW TRIAL

DEL. SUPERIOR COURT R. CRIM. P. 33 (1987) (2 year limit, but if an appeal is pending, motion may be granted only on remand of the case); *Lloyd v. State*, 534 A.2d 1262, 1267 (Del. 1987) (standard for granting new trial based on newly discovered evidence: (1) "would have probably changed the result if presented to the jury"; (2) newly discovered and exercise of due diligence; and (3) not merely cumulative or impeaching); *Blankenship v. State*, 447 A.2d 428, 434 (Del. 1982) (standard for granting new trial based on recanted evidence: (1) court "is reasonably well satisfied that testimony given by material witness is false"; (2) without it, jury might have reached a different verdict; and (3) party seeking new trial was surprised by testimony and was unable to meet it or did not know of its falsity until after the trial)

POST-CONVICTION REMEDIES

DEL. SUPERIOR COURT R. CRIM. P. 61(a)(1) (availability of review for claims of newly discovered evidence pertaining solely to the issue of guilt

or innocence is not resolved, but rule provides that post-conviction review is limited "to set aside a judgment of conviction on the ground that . . . there is a sufficient factual and legal basis for a collateral attack upon a criminal conviction"); *id.* 48(a) (permitting prosecutor to apply for a post-trial entry of nolle prosequi)

CLEMENCY, ETC.

DEL. CONST. art. VII, § 1

DISTRICT OF COLUMBIA

MOTION FOR NEW TRIAL

D.C. SUPERIOR CT. CRIM. R. 33 (1992) (2 year limit); *Wright v. United States*, 387 A.2d 582, 587 (D.C. 1978) (standard for granting motion for new trial based on newly discovered evidence: (1) evidence discovered since trial; (2) due diligence; (3) not merely cumulative or impeaching; (4) evidence is material; and (5) "would probably produce an acquittal" upon new trial)

POST-CONVICTION REMEDIES

D.C. CODE § 23-110 (1993) (remedies on motion attacking sentence); *id.* § 23-110(b) (no time limit); *see also Swain v. Pressley*, 430 U.S. 372 (1977) (upholding federal statute expressly precluding federal habeas corpus review of criminal judgments from the Superior Court of the

CLEMENCY, ETC.

CONN. CONST. art. IV, § 13; CONN. GEN. STAT. ANN. § 18-26 (1988)

DELAWARE

MOTION FOR NEW TRIAL

DEL. SUPERIOR COURT R. CRIM. P. 33 (1987) (2 year limit, but if an appeal is pending, motion may be granted only on remand of the case); *Lloyd v. State*, 534 A.2d 1262, 1267 (Del. 1987) (standard for granting new trial based on newly discovered evidence: (1) "would have probably changed the result if presented to the jury"; (2) newly discovered and exercise of due diligence; and (3) not merely cumulative or impeaching); *Blankenship v. State*, 447 A.2d 428, 434 (Del. 1982) (standard for granting new trial based on recanted evidence: (1) court "is reasonably well satisfied that testimony given by material witness is false"; (2) without it, jury might have reached a different verdict; and (3) party seeking new trial was surprised by testimony and was unable to meet it or did not know of its falsity until after the trial)

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CLEMENCY, ETC.

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DISTRICT OF COLUMBIA

MOTION FOR NEW TRIAL

D.C. SUPERIOR CT. CRIM. R. 33 (1992) (2 year limit); *Wright v. United States*, 387 A.2d 582, 587 (D.C. 1978) (standard for granting motion for new trial based on newly discovered evidence: (1) evidence discovered since trial; (2) due diligence; (3) not merely cumulative or impeaching; (4) evidence is material; and (5) "would probably produce an acquittal" upon new trial)

POST-CONVICTION REMEDIES

D.C. CODE § 23-110 (1993) (remedies on motion attacking sentence); *id.* § 23-110(b) (no time limit); *see also Swain v. Pressley*, 430 U.S. 372 (1977) (upholding federal statute expressly precluding federal habeas corpus review of criminal judgments from the Superior Court of the

District of Columbia, except under very narrow circumstances)

CLEMENCY, ETC.

U.S. CONST. art. II, § 2, cl. 1 (power of President to grant pardons); 28 C.F.R., pt. 1 (pardon procedures)

FLORIDA

MOTION FOR NEW TRIAL

FLA. R. CRIM. P. 3.590(a) (1994) (10 day limit); *id.* 3.600(a)(3) (1994) ("New and material evidence, which, if introduced at the trial would probably have changed the verdict or finding of the court, and which the defendant could not with reasonable diligence have discovered and produced at the trial, has been discovered."); *Sevier v. State*, 596 So.2d 771, 772 (Fla. Dist. Ct. App. 2d Dist. 1992) (standard on newly discovered evidence is that the evidence must be of such a nature that it would probably produce an acquittal on retrial, *not* that the evidence would have "conclusively" produced a different verdict)

POST-CONVICTION REMEDIES

FLA. R. CRIM. P. 3.800 (1994) (corrections of an illegal sentence may be raised at any time; not

applicable to capital cases, minimum mandatory sentence or no sentencing discretion circumstances); *id.* 3.850(b) (motion to vacate sentence that exceeds the limits provided by law may be filed at any time; 2 year limit on all other motions, unless they are based on newly discovered facts); *id.* 3.851(b)(1) (motion to vacate sentence of death shall be filed within 1 year after judgment and sentence of death become final); *Jones v. State*, 591 So.2d 911 (Fla. 1991) (per curiam) (relief for newly discovered evidence claim under 3.850 or "new" 3.851 contingent on: (1) due diligence; and (2) "newly discovered evidence must be of such a nature that it would *probably* produce an acquittal on retrial") (emphasis in original)

CLEMENCY, ETC.

FLA. CONST. art. IV, § 8 (1968); FLA. STAT. § 940./01 (Supp. 1993); RULES OF EXECUTIVE CLEMENCY OF FLORIDA 17; *see also* FLA. STAT. 922 (1993) (statutes regulating executions)

GEORGIA

MOTION FOR NEW TRIAL

GA. CODE ANN. § 5-5-23 (1990) (motion for new trial may be granted based on newly discovered evidence when evidence is: (1) material; (2) not

merely cumulative or impeaching; (3) discovered since trial; and (4) when motion filed within time allowed for filing motion for new trial); *id.* § 5-5-40(a) (1982) (motion for new trial, except in extraordinary cases, shall be filed within 30 days); *id.* § 5-5-40(f) (1982) (motions for new trial in death penalty cases given priority); *Young v. State*, 194 Ga. App. 335, 390 S.E.2d 305, 305-306 (1990) (standard for granting motion for new trial based on newly discovered evidence: (1) evidence discovered since trial; (2) due diligence; (3) "so material that it would probably produce a different verdict"; (4) not merely cumulative; (5) affidavit of witness attached, or its absence accounted for; and (6) does not operate solely to impeach)

POST-CONVICTION REMEDIES

GA. CODE ANN. § 5-5-41(a) (1982) (extraordinary motion for new trial may be filed after expiration of 30 day limit for filing motion for new trial upon showing of good reason for delay); *id.* § 5-5-41(b) (1982) (once a motion for a new trial is filed within 30 day limit and overruled, or after expiration of 30 day limit, only extraordinary motions for a new trial will be allowed; only one extraordinary motion allowed per verdict or judgment); *Dick v. State*, 248 Ga. 898, 287 S.E.2d 11, 13-14 (1982) (standard for granting extraordinary motion for new trial based on newly discovered evidence: (1) evidence discovered

since trial; (2) due diligence; (3) evidence is "so material that it would probably produce a different verdict"; (4) not merely cumulative; (5) not merely impeaching; and (6) witness affidavit attached or its absence accounted for); GA. CODE ANN. § 9-14-40 *et seq.* (habeas corpus provisions); *id.* (no time limit); *Bush v. Chappell*, 225 Ga. 659, 171 S.E.2d 128, 130 (1969) (remedy for newly discovered evidence is by extraordinary motion for new trial, not by habeas corpus)

CLEMENCY, ETC.

GA. CONST. art. IV, § II, ¶ II; GA. CODE ANN. §§ 42-9-20, 42-9-42 (1991)

HAWAII

MOTION FOR NEW TRIAL

HAW. REV. STAT. § 635-56 (1985) (court may grant new trial for any legal cause); HAW. R. PENAL P. 33 (1992) (10 day limit); *State v. Caraballo*, 62 HAW. 309, 615 P.2d 91, 97 (1980) (standard for granting motion for new trial based on newly discovered evidence: (1) evidence discovered since trial; (2) due diligence; (3) evidence is material and not merely cumulative or impeaching; and (4) "would probably change the result of a later trial")

POST-CONVICTION REMEDIES

HAW. R. PENAL P. 40 (post-conviction proceedings); *id.* (no time limit); *State v. Allen*, 7 Haw. App. 89, 744 P.2d 789, 792 (1987) ("allegations of petition must show that if taken as true the facts alleged would change the verdict")

CLEMENCY, ETC.

HAW. REV. STAT. § 353-72 (1993)

IDAHO

MOTION FOR NEW TRIAL

IDAHO CODE § 19-2406(7) (1987) (motion for new trial may be granted based on newly discovered evidence); IDAHO CRIM. R. 34 (2 year limit); *State v. Drapeau*, 97 Idaho 685, 551 P.2d 972, 978 (1976) (standard for granting new trial based on newly discovered evidence: (1) evidence newly discovered and unknown to defendant during trial; (2) material and not merely cumulative or impeaching; (3) "will probably produce an acquittal"; and (4) no lack of diligence); *see also id.* 551 P.2d at 979 (new trial granted if evidence is "such as to render a different verdict reasonably probable upon a retrial")

POST-CONVICTION REMEDIES

IDAHO CODE § 19-4901(a)(4) (1987) (relief granted upon showing that newly discovered evidence of material facts exists "that requires vacation of

the conviction or sentence in the interest of justice"); *id.* § 19-4901(b) (issues that could have been raised on direct appeal but were not are forfeited, unless it appears to the court, upon substantial factual showing, "that the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt" and could not have been presented with exercise of due diligence); *id.* § 19-4902 (1 year limit); *id.* § 19-2719(3) (capital defendant must file any legal or factual challenges within 42 days of judgment, and before death warrant is filed); *State v. Drapeau*, 97 Idaho 685, 551 P.2d 972, 978 (1976) (same standard as motion for new trial based on newly discovered evidence)

CLEMENCY, ETC.

IDAHO CONST. art. IV, § 7; Idaho Code §§ 20-240 (Supp. 1992), 67-804 (1989)

ILLINOIS

MOTION FOR NEW TRIAL

725 ILL. COMP. STAT. 5/116-1 (30 day limit); *People v. Molstad*, 101 Ill.2d 128, 134, 461 N.E.2d 398, 401-02 (1984) (standard for granting a new trial based on newly discovered evidence: (1) "must be of such conclusive character that it will probably change the result on retrial"; (2) material; (3) not merely cumulative; (4) evidence discovered since trial; and (5) due diligence)

POST-CONVICTION REMEDIES

725 ILL. COMP. STAT. 5/122-1 (time limits applying to post-conviction requests containing a claim of newly discovered evidence: (1) 6 month limit from denial of a petition for leave to appeal or the date for filing such a petition if none is filed or issuance of the opinion from the Illinois Supreme Court; or (2) 6 month limit from date of the order denying certiorari by the United States Supreme Court or the date for filing such a petition if none is filed; or (3) 3 year limit from date of conviction; whichever is later unless the petitioner alleges facts showing that delay was not due to his culpable negligence); 735 ILL. COMP. STAT. 5/2-1401 (2 year limit for petitions for relief from judgment); *People v. Sanchez*, 131 Ill.2d 417, 546 N.E.2d 574, 576 (1989) (one purpose of a petition for relief from judgment is to "bring before the court facts which had they been known at the trial would have prevented the entry of the contested judgment")

CLEMENCY, ETC.

ILL. CONST. art. V, § 12; 730 ILL. COMP. STAT. 5/3-3-13 (1991)

INDIANA

MOTION FOR NEW TRIAL

IND. RULE PC 2 (provisions for belated motion to correct error and belated appeal); IND. R. CRIM. P. 16(A) (motion to correct error necessary when party seeks to address newly discovered material evidence capable of production within 30

days of final judgment); *id.* 16(B) (1992) (30 day limit for filing motion to correct error); IND. TRIAL R. 59(A)(1) (motion to correct error is a prerequisite for appeal when party seeks to address newly discovered material evidence capable of production within 30 days of judgment); *id.* 59(C) (30 day limit for filing motion to correct error); *Fox v. State*, 568 N.E.2d 1006, 1007 (Ind. 1991) (standard for granting motion to correct error based on newly discovered evidence: (1) evidence discovered since trial; (2) material and relevant; (3) not cumulative; (4) not merely impeaching; (5) not privileged or incompetent; (6) due diligence; (7) worthy of credit; (8) can be produced upon retrial; and (9) will probably produce a different result)

POST-CONVICTION REMEDIES

IND. RULE PC 1, § 1(a)(4) (relief available for persons claiming newly discovered evidence of material facts); *id.* (no time limit); *Torrence v. State*, 263 Ind. 202, 328 N.E.2D 214, 216-17 (1975) (standard for granting relief based on newly discovered evidence under IND. RULE PC 1, § 1(a)(4) is the same standard applied when granting a motion to correct error based on newly discovered evidence: (1) evidence discovered since trial; (2) material and relevant; (3) not cumulative; (4) not merely impeaching; (5) not privileged or incompetent; (6) due diligence; (7) orthy of credit; (8) can be produced upon retrial; and (9) will probably produce a different result)

CLEMENCY, ETC.

IND. CONST. art. V, § 17; IND. CODE §§ 11-9-2-1 to 11-9-2-4, 35-38-6-8 (1988)

IOWA

MOTION FOR NEW TRIAL

IOWA R. CRIM. P. 23.2 (1993) (45 day limit from date of conviction or 5 days prior to sentencing, whichever is earlier); *id.* 23.2(b)(8) (new trial may be granted based on newly discovered important and material evidence, 2 year limit, absent good cause); *Origer v. State*, 495 N.W.2d 132, 139 (Iowa Ct. App. 1992) (standard for granting motion for new trial based on newly discovered evidence: (1) evidence discovered since verdict; (2) due diligence; (3) material, not merely cumulative or impeaching; and (4) would probably change the result)

POST-CONVICTION REMEDIES

IOWA CODE § 822.3 (1993) (3 year limit, waiver available if there is a claim of law or fact that could not have been raised within the statutory time); *State v. Edman*, 444 N.W.2d 103, 106 (Iowa Ct. App. 1989) (court must "be satisfied that a true injustice has been perpetrated" when granting a new trial based on newly discovered evidence after expiration of the 3 year limit); *State v. Bear*, 417 N.W.2d 467, 471-72 (Iowa Ct. App. 1987) (standard for granting motion for new trial or post-conviction relief based on newly

discovered evidence: (1) due diligence; (2) material, not merely cumulative or impeaching; and (3) would probably change the result)

CLEMENCY, ETC.

IOWA CONST. art. IV, § 16; IOWA CODE §§ 914.1 to 914.6

KANSAS

MOTION FOR NEW TRIAL

KAN. STAT. ANN. § 22-3501(1) (1988) (2 year limit for motion for new trial based on newly discovered evidence; 10 day limit if based on any other grounds); *State v. Hobson*, 697 P.2d 1274, 1275-76 (1985) (standard for granting motion for new trial based on newly discovered evidence: (1) "evidence is of such materiality that it would be likely to produce a different result upon retrial"; (2) due diligence; and (3) not merely impeaching) (internal citation omitted)

POST-CONVICTION REMEDIES

KAN. CIV. PRO. CODE ANN. § 60-1507 (contains no explicit provision for newly discovered evidence); *id.* § 60-1507(a) (no time limit); *see State v. Bradley*, 246 Kan. 316, 319, 787 P.2d 706 (1990) (same standard applies for post-conviction

granting of a new trial based on newly discovered evidence as applies to motions for new trial based on newly discovered evidence)

CLEMENCY, ETC.

KAN. CRIM. PRO ANN. § 22-3701

KENTUCKY

MOTION FOR NEW TRIAL

KY. R. CRIM. P. 10.02(1) (new trial may be granted for any cause which prevented fair trial, or is required in interest of justice); *id.* 10.02(2) (court may order new trial on its own initiative within 10 days of verdict for any reason it might have granted a new trial on motion of defendant); *id.* 10.06(1) (1983) (motion must be made within 5 days of return of verdict, or within 1 year of judgment if based on newly discovered evidence, or at a later time if the court for good cause permits); *Wheeler v. Commonwealth*, 395 S.W.2d 569, 571, 572 (Ky. 1965) (standard for granting motion for new trial based on newly discovered evidence: (1) due diligence; and (2) evidence "must be of such decisive value or force that it would, with reasonable certainty, have changed the verdict or that it would probably change the result if a new trial should be granted")

POST-CONVICTION REMEDIES

KY. R. CRIM. P. 11.42(1) (motion to vacate, set aside or correct sentence based on claim of right to be released on ground that sentence is subject

to collateral attack); *id.* (no time limit); KY. R. CIV. P. 60.02(b) (motion for relief of final judgment based on newly discovered evidence that could not have been discovered in time to move for a new trial may be filed within 1 year); *Gross v. Commonwealth*, 648 S.W.2d 853, 856-57 (Ky. 1983) (relief under KY. R. CIV. P. 60.02 is discretionary and as a threshold issue, motion must be made within reasonable time); *id.* at 857 (language of KY. R. CRIM. P. 11.42 forecloses the defendant from raising any questions under KY. R. CIV. P. 60.02 which are issues that could reasonably have been presented by R. 11.42 proceedings); KY. STAT. ANN. § 419.020 *et seq.* (provisions for habeas corpus); *id.* § 419.020 (no time limit)

CLEMENCY, ETC.

KY. CONST. § 77

LOUISIANA

MOTION FOR NEW TRIAL

LA. CODE CRIM. PROC. art. 853 (West 1994) (1 year limit if based on newly discovered evidence, but if an appeal is pending, motion may be granted only on remand); *id.* (if based on any other grounds, motion must be filed before sentencing; sentencing may be postponed for good cause); *id.* art. 851(3) (statutory standard for motion for new trial based on newly discovered evidence); *State v. Prudholm*, 446 So.2d 729, 735 (La. 1984) (standard for granting motion for new trial based on newly discovered evidence: (1)

evidence discovered since trial; (2) due diligence; (3) material to issues at trial; and (4) "must be of such a nature that it would probably produce an acquittal" upon retrial); *id.* at 736 (noting "except in rare circumstances, a motion for a new trial should not be granted on the basis of a recantation since that disclaimer is tantamount to admission of perjury so as to discredit the witness at later trial"); *State v. Cobb*, 419 So.2d 1237, 1245 (La. 1982) (defendant bears burden of proving "an injustice was done or that the trial court abused its discretion" in denying the motion)

POST-CONVICTION REMEDIES

La. Code Crim. Proc. art. 924 *et seq.* (West 1994) (provisions for post-conviction relief; contains no explicit provision for claims of newly discovered evidence); *id.* art. 930.8 (3 year limit, unless defendant has received death sentence or a stated exception applies); *id.* art. 930.3 (enumerating grounds upon which post-conviction application may be filed, including that the conviction was obtained in violation of the defendant's state or federal constitutional rights)

CLEMENCY, ETC.

La. Const. art. IV, § 5(E) (1974); La. Rev. Stat. Ann. § 15:572 (West 1992)

MAINE

MOTION FOR NEW TRIAL

Me. R. Crim. P. 33 (1992) (2 year limit if based on newly discovered evidence; 10 day limit if based on any other grounds); *State v. Rich*, 592 A.2d 1085, 1087 (Me. 1991) (standard for granting motion for new trial based on newly discovered evidence: (1) new evidence "will probably change the result" upon retrial; (2) evidence discovered since trial; (3) due diligence; (4) material; and (5) "not merely cumulative or impeaching, unless it is clear that such impeachment would have resulted in a different verdict")

POST-CONVICTION REMEDIES

Me. Rev. Stat. Ann. tit. 15, § 2121 *et seq.* (West 1980) (no time limit); *id.* (no express provision for newly discovered evidence)

CLEMENCY, ETC.

Me. Const. art. V, part. 1, § 11

MARYLAND

MOTION FOR NEW TRIAL

Md. R. Crim. P. 4-331(a) (10 day limit); Md. R. Crim. P. 4-331(c) (1992) (1 year limit when motion is based on newly discovered evidence that could not have been discovered within the general 10 day limit); *Love v. State*, 95 Md.App. 420, 430-33, 621 A.2d 910, 915-917 (Md. Ct. Spec. App.) (standard for granting motion for new

trial based on newly discovered evidence: (1) evidence is newly discovered which could not have been discovered with due diligence; (2) material; (3) not merely cumulative or impeaching; and (4) there is "a substantial or significant possibility that the verdict of the trier of fact would have been affected by the absence of the evidence, to wit, that the newly discovered evidence may well have produced a different result"), *cert. denied*, 331 Md. 480, 628 A.2d 1067 (1993); *see also Yorke v. State*, 315 Md. 578, 588, 556 A.2d 230 (1989)

POST-CONVICTION REMEDIES

MD. CODE ANN. art. 27, § 645A (post-conviction procedure "to set aside or correct the sentence"; no explicit provision for newly discovered evidence); *id.* § 645A(a)(2) (2 petition limit); *id.* § 645A(a)(3)(i) (240 day limit for first petition in capital case); *id.* § 645A(a)(3)(ii) (extension available upon showing of good cause)

CLEMENCY, ETC.

MD. CONST. art. II, § 20; MD. CODE ANN. art. 27, § 77 (1992 Repl. Vol.); *id.* art. 41, § 4-513, *et seq.* (1993 Repl. Vol.)

MASSACHUSETTS

MOTION FOR NEW TRIAL

MASS. R. CRIM. P. 30(b) (1979) (provision for granting motion for new trial "at any time if it appears that justice may not have been done"; if appeal is pending when motion is filed, leave to

proceed must be granted by appellate court; if it is a capital (or first degree murder) case, leave to proceed must be granted by state supreme court, which has exclusive jurisdiction over capital cases; appeals are stayed if leave to proceed is granted); *Commonwealth v. Grace*, 397 Mass. 303, 491 N.E.2d 246, 248 (1986) (standard for granting new trial based on newly discovered evidence: (1) evidence discovered since trial "casts a real doubt on the justice of the conviction"; (2) evidence is material, credible, and carries "a measure of strength in support of the defendant's position"; (3) "there is a substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial"; and (4) due diligence)

POST-CONVICTION REMEDIES

Leaster v. Commonwealth, 385 Mass. 547, 432 N.E.2d 708, 709 (1982) (MASS. R. CRIM. P. 30 "was adopted in 1979 as the exclusive vehicle for post-conviction relief"); MASS. R. CRIM. P. 30(a) (no time limit for filing application for post-conviction relief based on claim of illegal or illegally imposed sentence, but newly discovered evidence not considered; new trial motion may be filed at any time under MASS. R. CRIM. P. 30(b)); *id.* 29 (60 day limit for filing motion to revise or revoke sentence when it appears that justice may not have been done); *but see Commonwealth v. Amirault*, 415 Mass. 112, 612 N.E.2d 631, 633 (1993) (judge cannot consider events taking place after sentencing when considering Rule 29 motions)

CLEMENCY, ETC.

MASS. CONST. pt. 2, ch. 2, § 1, art. 8; MASS. GEN. L. ch. 127, §§ 152, 154 (Petitions for clemency are first considered by the Advisory Board of Pardons, which makes recommendations to the Governor; after considering the advice and consent of the Governor's Council, Governor may grant executive clemency)

MICHIGAN

MOTION FOR NEW TRIAL

MICH. CT. R. 6.431(A)(1992) ([1] 42 day limit from date of judgment, which is same period for filing an appeal by right; [2] if claim of appeal is filed, 28 days from date of commencement of time for filing defendant-appellant's brief; [3] if defendant fails to file a timely claim of appeal, he may file a motion for new trial within the time for filing an application for leave to appeal – 18 months from date of judgment); *id.* 6.431(B) (court may grant motion for new trial "on any ground that would support appellate reversal of the conviction" or if the "verdict has resulted in a miscarriage of justice"); *Michigan v. Barbara*, 400 Mich. 352, 255 N.W.2d 171, 174 (1977) (standard for granting motion for new trial based on newly discovered evidence: (1) "evidence itself, not merely its materiality, was newly-discovered"; (2) not cumulative; (3) will "render a different result probable on a retrial"; and (4) due diligence); *id.* (recantation testimony "traditionally regarded as suspect and untrustworthy"); *id.* (where new evidence is only impeaching, it is deemed merely cumulative)

POST-CONVICTION REMEDIES

MICH. CT. R. 6.500 *et seq.* (provisions for post-conviction relief); MICH. CT. R. 6.508(D)(3) (grounds for relief cannot be repetitive of claims that could have been raised in previous motions or on appeal, unless defendant demonstrates good cause and actual prejudice, or if the court finds "there is a significant possibility that defendant is innocent of the crime")

CLEMENCY, ETC.

MICH. CONST. art. V, § 14; MICH. COMP. LAWS §§ 791.243 (MICH. STAT. ANN. § 28.2313); MICH. COMP. LAWS § 791.244 (MICH. STAT. ANN. § 28.2314)

MINNESOTA

MOTION FOR NEW TRIAL

MINN. R. CRIM. P. 26.04, Subd. 1(1), ¶ 5 (provision for granting new trial based on newly discovered material evidence that could not have been found and produced at the trial with reasonable diligence); *id.* 26.04, Subd. 1(3) (1992) (15 day limit); *State v. Caldwell*, 322 N.W.2d 574, 588 (Minn. 1982) (standard for granting motion for new trial based on newly discovered evidence: (1) due diligence; (2) evidence was not within petitioner's or his counsel's knowledge at the time of trial; (3) not merely impeaching, cumulative or doubtful; (4) "would probably produce a result different from or more favorable than that which actually occurred"; and (5) material)

POST-CONVICTION REMEDIES

MINN. STAT. § 590.01 *et seq.* (1992) (contains no time limit or explicit provision for newly discovered evidence); *Berry v. State*, 364 N.W.2d 795, 796 (Minn. 1985) (standard for granting new trial on basis of newly discovered evidence: Petitioner has burden to show by a fair preponderance of the evidence: (1) due diligence; (2) evidence was not known to defense at time of trial; (3) evidence is "not impeaching, cumulative, or doubtful"; and (4) it "would probably produce a result different from or more favorable than that which actually occurred")

CLEMENCY, ETC.

MINN. CONST. art. V, § 7; MINN. STAT. § 638.01 *et seq.* (1992)

MISSISSIPPI

MOTION FOR NEW TRIAL

MISS. CODE ANN. § 99-17-47 (1993) (provisions for motion for new trial, limit of 2 trials shall be granted to the same party in any cause); MISS. UNIFORM CRIM. R. CIR. CT. P. 5.16(3) (1992) (requirements for granting motion for new trial based on newly discovered evidence: (1) new and material evidence; (2) would probably produce a different result; and (3) due diligence); *id.* (motion for new trial based on newly discovered evidence must be made before adjournment of the term of court in which defendant was convicted); *Gaston v. State*, 562 So.2d 61, 63 (Miss. 1990) (standard for granting motion for new

trial based on newly discovered evidence – court must be satisfied that: (1) evidence discovered since trial; (2) due diligence; and (3) "would probably produce a different result" upon retrial)

POST-CONVICTION REMEDIES

MISS. CODE ANN. § 99-39-5(1)(e) (Supp. 1990) (relief granted when there exists newly discovered evidence that requires vacation of conviction or sentence in the interest of justice); *id.* § 99-39-5(2) (3 year limit, exception for those cases in which petitioner can show existence of newly discovered evidence of such a nature that it "would be practically conclusive" that if introduced at trial, it would have "caused a different result in the conviction or sentence")

CLEMENCY, ETC.

MISS. CONST. art. V, § 124; MISS. CODE ANN. § 47-5-115 (1981)

MISSOURI

MOTION FOR NEW TRIAL

MO. R. CRIM. P. 29.11(b) (1992) (15 day limit for a motion for new trial based on newly discovered evidence; 10 day extension available); *State v. Johns*, 679 S.W.2d 253, 266 (Mo. banc 1984) (standard for granting new trial based on newly discovered evidence: (1) evidence discovered since trial; (2) due diligence; (3) "evidence is so material that it would probably produce a different result on a new trial"; and (4) not cumulative or

merely impeaching), *cert. denied*, 470 U.S. 1034 (1985)

POST-CONVICTION REMEDIES

Mo. R. Crim. P. 29.15(b) (motion for post-conviction relief limited to vacating, setting aside, or correcting judgment and must be filed within 30 days of appellate judgment if appeal was taken; within 90 days of defendant's deliverance to department of corrections if no appeal was sought); *Wilson v. State*, 813 S.W.2d 833, 834 (Mo. banc 1991) (claim of newly discovered evidence may not be raised in post-conviction relief motion); *State v. McKinney*, 475 S.W.2d 51, 54 (Mo. 1971) (claim of newly discovered evidence cannot be raised on direct appeal)

CLEMENCY, ETC.

Mo. Const. art. IV, § 7; Mo. Rev. Stat. §§ 217.220 (Vernon Supp. 1992), 552.070 (Vernon 1987) *Whitaker v. State*, 451 S.W.2d 11, 15 (Mo. 1970) (newly discovered evidence concerning innocence is cognizable in a clemency proceeding)

MONTANA

MOTION FOR NEW TRIAL

Mont. Code Ann. § 46-16-702(2) (1991) (30 day limit); *State v. Redcrow*, 242 Mont. 254, 790 P.2d 449, 452-53 (1990) (application for new trial must show: (1) evidence discovered since trial; (2) due diligence; (3) "so material that it would probably produce a different result upon another trial"; (4) not cumulative; (5) supported

by affidavit of witness whose evidence is newly discovered; and (6) not merely impeaching); *State v. Perry*, 232 Mont. 455, 758 P.2d 268, 275 (1988) (new trial based on recanted testimony will be granted only when the judge is "satisfied the recantation of the witness is true")

POST-CONVICTION REMEDIES

Mont. Code Ann. § 46-21-101 *et seq.* (petition to vacate, set aside, or correct sentence; contains no explicit provision for newly discovered evidence); *id.* § 46-21-105(2) (newly discovered evidence could be raised in an original or amended petition if the grounds for relief could not have reasonably been raised on direct appeal); *id.* § 46-21-105(1) (if petitioner can show newly discovered evidence could not reasonably have been raised in the original or amended petition, it may be raised in a subsequent petition); *id.* § 46-21-102 (5 year limit); *but see State v. Perry*, 232 Mont. 455, 758 P.2d 268, 272-73 (1988) (5 year statute of limitations was not meant to "deprive defendants held in violation of their constitutional rights of a method of redress regardless of [their] diligence or the justness of [their] claim"; post-conviction request for relief based on newly discovered evidence was therefore reviewable); *id.* at 273 (standard for granting a new trial based on newly discovered evidence that another person committed the crime: defendant "must demonstrate that he has been the victim of an unjust conviction which has resulted in his unlawful detention")

CLEMENCY, ETC.

MONT. CONST. art. VI, § 12; MONT. CODE ANN. §§ 46-23-301 to 46-23-316 (1991)

NEBRASKA

MOTION FOR NEW TRIAL

NEB. REV. STAT. § 29-2101 (Reissue 1989) (motion for new trial based on newly discovered evidence may be granted if: (1) evidence is material; and (2) due diligence); *State v. Atkinson*, 191 Neb. 9, 213 N.W.2d 351, 352 (1973) (motion for new trial will be granted upon timely application when based on newly discovered evidence that is material, provided the defendant's substantial rights are affected and he could not produce the evidence at trial with exercise of reasonable diligence); NEB. REV. STAT. § 29-2103 (Reissue 1989) (3 year limit if based on newly discovered evidence; 10 day limit if motion is based on anything except newly discovered evidence); *Smith v. State*, 167 Neb. 492, 93 N.W.2d 499, 500 (1958) (same)

POST-CONVICTION REMEDIES

State v. Dabney, 183 Neb. 316, 160 N.W.2d 163, 164 (1968) (post-conviction claim based on newly discovered evidence is not permitted)

CLEMENCY, ETC.

NEB. CONST. art. IV § 13; NEB. REV. STAT. §§ 83-1, 130 (Board of Pardons may grant or deny relief); *see also Otey v. State*, 240 Neb. 813, 485 N.W.2d 153, 166 (1992)

NEVADA

MOTION FOR NEW TRIAL

NEV. REV. STAT. ANN. §§ 176.515(1), (3) (2 year limit when motion is based on newly discovered evidence); *id.* § 176.515(4) (7 day limit for any other grounds); *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d 1279 (1991) (standard for granting new trial based on newly discovered evidence: (1) newly discovered; (2) material; (3) due diligence; (4) non-cumulative; (5) would "render a different result probable upon retrial"; (6) not merely impeaching "unless the witness is so important that a different result would be reasonably probable"; and (7) evidence is "the best evidence the case admits")

POST-CONVICTION REMEDIES

NEV. REV. STAT. ANN. § 177.315 *et seq.* (concerning state habeas petitions); *id.* § 34.725 *et seq.* (same); *Snow v. State*, 105 Nev. 521, 523, 779 P.2d 96 (1989) (standard for granting new trial in a capital case, after two year limit for motion for new trial based on newly discovered evidence, "new evidence tending to prove . . . conviction was illegally obtained" may be considered on state habeas review)

CLEMENCY, ETC.

NEV. CONST. art. V, § 14; NEV. REV. STAT. § 213.080 (1991)

NEW HAMPSHIRE

MOTION FOR NEW TRIAL

N.H. Rev. Stat. Ann. § 526:1 (1983) (provisions for granting motion for new trial); *id.* § 526:4 (1974) (3 year limit); *State v. Cote*, 129 N.H. 358, 530 A.2d 775, 781-82 (1987) (standard for granting new trial based on newly discovered evidence: (1) moving party was not at fault for not discovering the evidence at trial; (2) evidence is admissable, material, and not cumulative; and (3) different result will probably be reached upon retrial)

POST-CONVICTION REMEDIES

N.H. Rev. Stat. Ann § 543:1 *et seq.* (habeas corpus provisions); *id.* § 534:3 (no time limit); *State v. Killam*, 137 N.H. 155, 626 A.2d 401, 404 (1993) (standard for granting new trial based on newly discovered evidence: (1) moving party was not at fault for not discovering the evidence at trial; (2) evidence is admissable, material to the merits, and not cumulative; and (3) "different result will probably be reached" upon retrial)

CLEMENCY, ETC.

N.H. Const. pt. 2, art. 52; N.H. Rev. Stat. Ann. § 4:23 (1988)

NEW JERSEY

MOTION FOR NEW TRIAL

N.J. Ct. R. 3:20-2 (motion for new trial based on newly discovered evidence "may be made at any time," but if an appeal is pending, motion may be granted only on remand; 10 day limit for any other ground); *State v. Carter*, 85 N.J. 300, 314, 426 A.2d 501, 508 (1981) (defendant must demonstrate that the new evidence is: (1) material and not merely cumulative or impeaching or contradictory; (2) discovered since trial and exercise of due diligence; and (3) "of the sort that would probably change the jury's verdict if new trial were granted"); *State v. Smith*, 29 N.J. 561, 573, 150 A.2d 769, 775 (on third element, must show that there is a probability not merely possibility that the jury's verdict would change if new trial were granted), *cert. denied*, 361 U.S. 861 (1959)

POST-CONVICTION REMEDIES

N.J. Ct. R. 3:22-12 (no time limit for filing petition for post-conviction relief to correct illegal sentence; 5 year limit for all other petitions, unless defendant alleges facts showing that the delay was due to excusable neglect); *see also State v. Mitchell*, 126 N.J. 565, 575, 601 A.2d 198, 203 (1992); N.J. Ct. R. 3:22-2 (post-conviction relief may be granted, *inter alia*, for an illegal sentence; or for any habeas corpus, common-law, or statutory grounds for a collateral attack); *id.* 3:22-4(b) ("fundamental injustice" exception to general bar to consider grounds not raised in prior proceedings); *see also State v. Preciose*, 129 N.J. 451, 476, 609 A.2d 1280, 1293 (1992) (fundamental injustice exception applies to guilt or

innocence); *id.* 129 N.J. at 459, 609 A.2d at 1284 (defendant must establish the right to relief under N.J. Ct. R. 3:22-2 by a preponderance of the credible evidence); *see also Mitchell*, 126 N.J. at 579, 601 A.2d at 205 ("specific facts must be alleged and articulated, which, if believed, would provide the court with an adequate basis on which to rest its decision")

CLEMENCY, ETC.

N.J. Const. art. V, § 2, ¶ 1; N.J. Stat. Ann. §§ 2A:167-4, 2A:167-12 (West 1985)

NEW MEXICO

MOTION FOR NEW TRIAL

N.M. R. Crim. P. 5-614(C) (1992) (2 year limit for motion for new trial based on newly discovered evidence, but if an appeal is pending, motion may be granted only on remand of the case; 10 day limit on any other grounds); *State v. Volpato*, 102 N.M. 383, 696 P.2d 471, 472 (1985) (standard for granting motion for new trial based on newly discovered evidence: (1) evidence "will probably change the result" upon retrial; (2) discovered since trial; (3) due diligence; (4) material; (5) not merely cumulative; and (6) not merely impeaching or contradictory)

POST-CONVICTION REMEDIES.

N.M. R. Crim. P. 5-802 (1992) (procedures for habeas petitions; no explicit provision for newly discovered evidence and no time limit for filing motion for relief); *see generally State v. Peppers*,

110 N.M. 393, 796 P.2d 614, 616-17 (N.M. Ct. App. 1990) (discussing post-conviction procedures)

CLEMENCY, ETC.

N.M. Const. art. V, § 6; N.M. Stat. Ann. § 31-21-17 (1990)

NEW YORK

MOTION FOR NEW TRIAL

N.Y. Crim. Proc. Law § 330.30 (requirements for granting motion to set aside verdict based on newly discovered evidence: (1) evidence is newly discovered; (2) due diligence; and (3) creates probability that had such evidence been received at trial the verdict would have been more favorable to defendant); *id.* (motion must be filed after verdict of guilty and before sentencing)

POST-CONVICTION REMEDIES

N.Y. Crim. Proc. Law § 440.10(g) (motion to vacate judgment may be granted on grounds of newly discovered evidence when: (1) evidence discovered since trial; (2) due diligence; (3) "create[s] a probability that had such evidence been received at trial the verdict would have been more favorable to defendant"; and (4) motion must be made with due diligence after discovery of new evidence); *id.* § 440.10(1) (no time limit); N.Y. Civ. Prac. Laws and Rules § 7003 (writ of habeas corpus); *id.* (no time limit)

CLEMENCY, ETC.

N.Y. CONST. art. IV, § 4

NORTH CAROLINA

MOTION FOR NEW TRIAL

N.C. GEN. STAT. § 15A-1414 (10 day limit to file "motion for appropriate relief"); *State v. Beaver*, 291 N.C. 137, 229 S.E.2d 179, 183 (1976) (standard for granting new trial based on newly discovered evidence: (1) newly discovered evidence; (2) newly discovered evidence is probably true; (3) material, competent, and relevant; (4) due diligence; (5) not merely cumulative or corroborative; (6) does not merely tend to contradict, impeach or discredit the testimony of a former witness; and (7) "different result will probably be reached at a new trial"); *see also State v. Britt*, 320 N.C. 705, 360 S.E.2d 660 (1987) (test for granting new trial based on recanted evidence: (1) court reasonably well satisfied that the testimony given by a material witness was false; and (2) reasonable possibility that, had the false testimony not been admitted, a different result would have occurred)

POST-CONVICTION REMEDIES

N.C. GEN. STAT. § 15A-1415(b)(6) (post-conviction relief based on newly discovered evidence may be sought after 10 day limit under § 15A-1414); *State v. Person*, 298 N.C. 765, 259 S.E.2d 867, 870 (1979) (applying same 7 factors under *State v. Beaver* after enactment of N.C. GEN. STAT. § 15A-1415(b)(6))

CLEMENCY, ETC.

N.C. CONST. art. III, § 5(6); N.C. GEN. STAT. §§ 147-23 to 147-25 (1987)

NORTH DAKOTA

MOTION FOR NEW TRIAL

N.D. R. CRIM. P. 33(b) (1992-1993) (Motion for new trial based on newly discovered evidence must be filed within 30 days from time new evidence is discovered *and* 2 years from final judgment); *State v. VanNatta*, 506 N.W.2d 63, 70 (N.D. 1993) (standard for granting motion for new trial based on newly discovered evidence: (1) evidence discovered since trial; (2) due diligence; (3) evidence is material; and (4) "the weight and quality of the newly discovered evidence would likely result in an acquittal")

POST-CONVICTION REMEDIES

N.D. CENT. CODE § 29-32.1-01(e) (1991) (post-conviction relief may be sought when newly discovered evidence exists, requiring vacation of the conviction or sentence in the interest of justice); *id.* § 29-32.1-03(2) (no time limit); *State v. Schlickenmayer*, 364 N.W.2d 108, 111 (N.D. 1985) (standard for granting post-conviction relief based on newly discovered evidence is the same standard applied for granting motion for new trial based on newly discovered evidence: (1) evidence discovered since trial; (2) due diligence; (3) evidence is material; and (4) will probably produce an acquittal); N.D. CENT. CODE

§ 32-22-01 *et seq.* (provisions for writ of habeas corpus)

CLEMENCY, ETC.

N.D. CONST. art. V, § 6

OHIO

MOTION FOR NEW TRIAL

OHIO R. CRIM. P. 33(A)(6) (1993) (motion for new trial may be granted when new material evidence is discovered that with reasonable diligence could not have been produced at trial); OHIO R. CRIM. P. 33(B), ¶ 2 (1988) (when motion is based upon newly discovered evidence, 120 day limit from judgment or 7 days from court finding that defendant was unavoidably prevented from discovering the evidence within the 120 day limit); *id.* 33(B), ¶ 1 (1988) (for all other grounds, 14 day limit or 7 days from court finding that defendant was unavoidably prevented from filing within the 14 day limit); *see also State v. Pinkerman*, 88 Ohio App.3d 158, 623 N.E.2d 643 (Lawrence County 1993) (construing "unavoidably prevented from filing" time limit rule); *State v. Walden*, 19 Ohio App.3d 141, 483 N.E.2d 859, 866 (Franklin County 1984) ("a party is unavoidably prevented from filing a motion for new trial if the party had no knowledge of the existence of the ground supporting the motion for new trial and could not have learned of the existence of that ground within the time

prescribed for filing the motion for new trial in the exercise of reasonable diligence")

POST-CONVICTION REMEDIES

OHIO REV. CODE ANN. § 2953.21 (Page's 1993) (petition to vacate or set aside sentence; contains no time limit or explicit provision for newly discovered evidence); *id.* § 2953.23(A) (Page's 1993) (for good cause shown, court may entertain a second petition or successive petitions for similar relief based upon the same facts or newly discovered evidence); *State v. Walden*, 19 Ohio App.3d 141, 483 N.E.2d 859, 866 (Franlin County 1984) (motion pursuant to OHIO REV. CODE ANN. § 2953.21 "must be predicated upon denial or infringement of constitutional rights so substantial as to render the judgment void or voidable")

CLEMENCY, ETC.

OHIO CONST. art. III, § 11 (Baldwin 1984); OHIO REV. CODE ANN. §§ 2967.01 to 2967.12 (Page's 1993)

OKLAHOMA

MOTION FOR NEW TRIAL

OKLA. STAT. ANN. tit. 22, § 952, ¶ 7 (West 1986) (provisions for granting new trial based on newly discovered evidence); OKLA. CT. R. AND P. § 952 (same); *id.* § 953 (motion must be made within 3 months of discovering new evidence but not later than 1 year after judgment); *Salyers v. State*, 755 P.2d 97, 101 (Okla. Crim. App. 1988)

(standard for granting motion for new trial based on newly discovered evidence: (1) evidence is material; (2) due diligence; (3) not cumulative; and (4) evidence "create[s] a reasonable probability that, had the newly discovered evidence been introduced at trial, it would have changed the outcome")

POST-CONVICTION REMEDIES

OKLA. STAT. ANN. tit. 22, § 1080 *et seq.* (contains no time limits, except in respect to prisoners sentenced to death); *id.* § 1089(C) (application for post-conviction relief when defendant is sentenced to death must be filed within 90 days after denial of certiorari by the U.S. Supreme Court or the expiration of time allowed to file petition for certiorari); *id.* § 1080(d) (grounds for relief may include newly discovered evidence of material facts); *see Brecheen v. State*, 835 P.2d 117, 121 (Okla. Crim. App. 1992) (suggesting that the standard for granting post-conviction relief based on newly discovered evidence is similar to the standard for granting motion for new trial based on newly discovered evidence), *cert. denied*, 113 S.Ct. 1063 (1993)

CLEMENCY, ETC.

OKLA. CONST. art. VI, § 10; OKLA. STAT., tit. 21, § 701.11a (Supp. 1990)

OREGON

MOTION FOR NEW TRIAL

OR. REV. STAT. § 136.535(1) (1991) (5 day limit, may be waived); OR. R. CIV. P. 64(B)(4) (motion for new trial may be granted based upon newly discovered evidence when original proceeding was a trial by jury); *State v. Adams*, 91 Or.App. 24, 29, 754 P.2d 1, 3 & n.4, 4 (1988) (standard for granting new trial based on newly discovered evidence; defendant must show: (1) evidence discovered since trial; (2) will " probably change the result of the trial"; and (3) not merely impeaching or contradictory)

POST-CONVICTION REMEDIES

OR. REV. STAT. § 138.530 (newly discovered evidence is not one of the statutorily listed bases for granting post-conviction relief, which must be based on constitutional infringement); *id.* § 138.510(2) (2 year limit for post-conviction relief)

CLEMENCY, ETC.

OR. CONST. art. V, § 14; OR. REV. STAT. §§ 144.640, 144.650 (1991)

PENNSYLVANIA

MOTION FOR NEW TRIAL

PA. R. CRIM. P. 1123(d) (motion for new trial based on newly discovered evidence must be raised "promptly" after discovering evidence; if appeal is pending, court may grant motion only

upon remand of the case); *id.* 1123(a) (motion for new trial based on grounds which were previously raised in trial or pre-trial motions must be filed within 10 days – may include other grounds, upon cause showing); *Commonwealth v. Brosnick*, 530 Pa. 158, 607 A.2d 725, 727 (1992) (standard for granting new trial based on newly discovered evidence: (1) evidence discovered since trial, exercise of due diligence; (2) not merely corroborative nor cumulative; (3) not merely impeaching credibility of a witness; (4) "a different verdict will likely result"; and (5) evidence must be producible and admissible); *see also Commonwealth v. Frey*, 512 Pa. 557, 517 A.2d 1265, 1267 n.4 (1986) (same), *cert. denied*, 481 U.S. 1007 (1987)

POST-CONVICTION REMEDIES

42 PA. CONS. STAT. ANN. § 9541 *et seq.* (1982) (Post-Conviction Hearing Act); *id.* § 9543(3)(xiii) (grounds for relief based on newly discovered exculpatory evidence "that would have affected the outcome of the trial if it had been introduced"); *id.* § 9545 (no time limit; only one petition for each crime allowed); PA. R. CRIM. P. 1123(f) (if petitioner is granted the right to file post-verdict motions as though timely filed, under the Post-Conviction Hearing Act, such motions must be filed within 10 days of the order granting the right, waiver available); *Commonwealth v. Frey*, 512 Pa. 557, 517 A.2d 1265, 1267 n.4 (1986) (standard for claims of newly discovered evidence made under § 9543(3)(xiii) are less restrictive than those made on direct appeal [i.e., second and third requirements of *Brosnick* test do not apply]), *cert. denied*, 481 U.S. 1007 (1987); *see also* PA. R. CRIM. P. 1500 *et seq.* (procedures for implementing the Post-Conviction Hearing Act); 42 PA. CONS. STAT. ANN. § 6503(b) (writ of habeas corpus is not available if a remedy may be had by post-conviction hearing proceedings)

CLEMENCY, ETC.

PA. CONST. art. IV, § 9

RHODE ISLAND

MOTION FOR NEW TRIAL

R.I. SUPERIOR CT. R. CRIM. P. 33 (1991-1992) (2 year limit for motion for new trial based on newly discovered evidence; 10 day limit for any other grounds); *State v. Morejon*, 603 A.2d 730, 737 (R.I. 1992) (standard for granting motion for new trial based on newly discovered evidence is a two part test: (1) threshold inquiry must meet 4 factors: (a) discovered since trial; (b) due diligence; (c) not merely cumulative or impeaching, but material to the issue: (d) "would probably change the verdict" at retrial; and (2) evidence must be credible enough to warrant a new trial)

POST-CONVICTION REMEDIES

R.I. GEN. LAWS § 10-9.1-1(a)(4) (1981) (relief based on newly discovered evidence of material facts requiring vacation of the conviction or sentence in the interest of justice); *id.* § 10-9.1-3 (no time limit); *Fontaine v. State*, 602 A.2d 521, 524 (R.I. 1992) ("standard for granting post-conviction relief [based on newly discovered evidence]

is the same standard for" motion for a new trial based on newly discovered evidence); *State v. Berberian*, 118 R.I. 413, 374 A.2d 778, 780 (1977) (doctrine of res judicata is inapplicable to state habeas corpus proceedings)

CLEMENCY, ETC.

R.I. CONST. art. IX, §§ 4, 13

SOUTH CAROLINA

MOTION FOR NEW TRIAL

S.C. R. CRIM. P. 29(b) (Supp. 1991) (motion must be made within reasonable time after discovery of new evidence); *State v. Caskey*, 273 S.C. 325, 256 S.E.2d 737, 738-39 (1979) (standard for granting motion for new trial based on newly discovered evidence: (1) evidence "would probably change the result" upon retrial; (2) evidence discovered since trial; (3) due diligence; (4) material to the issue of guilt or innocence; and (5) not merely cumulative or impeaching), *cert. denied*, 444 U.S. 1012 (1980)

POST-CONVICTION REMEDIES

S.C. CODE ANN. § 17-27-20(a)(4) (grounds for relief include newly discovered evidence); *Hayden v. State*, 278 S.C. 610, 299 S.E.2d 854, 855 (1983) (standard for granting post-conviction relief based on newly discovered evidence is the same standard applied for granting motion for new trial based on newly discovered evidence: (1) evidence "would probably change the result" upon retrial; (2) evidence discovered since trial; (3) due diligence; (4) material to the issue of

guilt or innocence; and (5) not merely cumulative nor impeaching); *McElrath v. State*, 276 S.C. 282, 277 S.E.2d 890 (1981) (laches may bar any claim for collateral relief in the absence of some explanation or justification for delay; reasonable diligence in processing claims for relief is required); *Brazell v. State*, 287 S.C. 253, 294 S.E.2d 343, 343 (1982) (per curiam) (state must show prejudice in order to claim doctrine of laches as a bar)

CLEMENCY, ETC.

S.C. CONST. art. IV, § 14; S.C. CODE ANN. §§ 24-21-910 to 24-21-1000 (1977 and Supp. 1991)

SOUTH DAKOTA

MOTION FOR NEW TRIAL

S.D. CODIFIED LAWS ANN. § 15-6-59(a) (motion for new trial in civil cases may be granted on grounds of newly discovered evidence that is material and which could not have been discovered with due diligence and produced at trial); *id.* § 23A-29-1 (motion for new trial in criminal case may be granted under the same conditions specified and in the same manner as provided by § 15-6-59(b)); *id.* (10 day limit)

POST-CONVICTION REMEDIES

S.D. CODIFIED LAWS ANN. § 21-27-1 *et seq.* (provision for writ of habeas corpus); *id.* § 21-27-3.2 (provisions for dismissing application for new trial based on newly discovered evidence due to prejudice against prosecution resulting from

delay in filing application – prejudice is rebuttably presumed if application is filed more than 5 years after judgment)

CLEMENCY, ETC.

S.D. CONST. art. IV, § 3; S.D. CODIFIED LAWS §§ 23A-27A-20 to 23A-27A-21, 24-14-1 (1988)

TENNESSEE

MOTION FOR NEW TRIAL

TENN. R. CRIM. P. 33(b) (30 day limit for filing motion for new trial); TENN. CODE ANN. § 40-26-105 (relief under writ of error coram nobis based on newly discovered evidence is only available upon a showing of due diligence and "if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial"); *id.* § 27-7-103 (1 year limit for filing petition for writ of error coram nobis); *Teague v. State*, 772 S.W.2d 915, 920 (Tenn. Crim. App. 1988) (as a practical matter, only difference between relief under TENN. R. CRIM. P. 33(b) and § 40-26-105 based on newly discovered evidence is the time for filing), *cert. denied*, 493 U.S. 874 (1989); *id.* at 921-22 (standard for granting new trial based on newly discovered evidence under TENN. R. CRIM. P. 33(b) or § 40-26-105: (1) discovered since trial; (2) may have resulted in different judgment if presented at trial; (3) petitioner "was without fault in failing to present" evidence at appropriate time; (4) affidavit relevant and material; (5) not simply cumulative; and (6) not merely impeaching)

POST-CONVICTION REMEDIES

TENN. CODE ANN. § 40-30-101 *et seq.* (Supp. 1988) (post-conviction remedies, including those based on newly discovered evidence, are cognizable only when raising a state or federal constitutional issue which was not either previously determined or waived); *id.* § 40-30-102 (3 year limit); *id.* § 40-30-112(b)(2) (rebuttable presumption that a ground for relief not raised in any prior proceeding is waived); *see also Teague v. State*, 772 S.W.2d 915, 923 (Tenn. Crim. App. 1988) (discussing post-conviction proceedings)

CLEMENCY, ETC.

TENN. CONST. art III, § 6; TENN. CODE ANN. §§ 40-27-101 to 40-27-103 (1990)

TEXAS

MOTION FOR NEW TRIAL

TEX. R. APP. P. 31(a)(1) (1992) (30 day limit); TEX. R. APP. P. 30(b)(6) (new trial granted "where new evidence favorable to the accused has been discovered since trial"); *Moore v. State*, No. 71,337, slip op. at 14-15, 1994 Tex. Crim. App. LEXIS 28 (Tex. Crim. App. Mar. 9, 1994) (standard for granting motion for new trial based on newly discovered evidence: (1) evidence discovered since trial; (2) due diligence; (3) evidence "would probably bring about a different result in another trial"; and (4) evidence is admissable and is not merely cumulative, corroborative, collateral, or impeaching)

POST-CONVICTION REMEDIES

TEX. CODE CRIM. PROC. ANN. art. 11.07 (state writ of habeas corpus); *State of Texas ex rel. Holmes v. Court of Appeals for the Third Dist.*, No. 71,764, slip op. at 16-17, 1994 Tex. Crim. App. LEXIS 52 (Tex. Crim. App. Apr. 20, 1994) (en banc) (state writ of habeas corpus available for claims of actual innocence based on newly discovered evidence if petitioner can demonstrate that the evidence "creates a doubt as to the efficacy of the verdict sufficient to undermine confidence in the verdict and that it is probable that the verdict would be different"; "applicant must show that based on the newly discovered evidence and the entire record before the jury that convicted him, no rational trier of fact could find proof of guilt beyond a reasonable doubt")

CLEMENCY, ETC.

TEX. CONST. art. IV, § 11; TEX. CODE CRIM. PROC. ANN. § 48.01 (Vernon 1979)

UTAH

MOTION FOR NEW TRIAL

UTAH R. CRIM. P. 24(a) (1994) (new trial may be granted "in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party"); *id.* 24(c) (10 day limit, "or within such further time as the court may fix during the 10-day period"); *State v. James*, 819 P.2d 781, 793 (Utah 1991) (standard for granting motion for new trial based on newly discovered evidence: (1) due

diligence; (2) not merely cumulative; and (3) would "render a different result probable" upon retrial)

POST-CONVICTION REMEDIES

UTAH R. CIV. P. 65B(b)(1) (petition for extraordinary relief, permitting relief from confinement where "the commitment resulted from a substantial denial of rights"); UTAH CODE ANN. § 78-12-31.1 (1992) (expressly providing time limit of 3 months, but provision was held unconstitutional on state law grounds in *Currier v. Holden*, 862 P.2d 1357, 1372 (Utah Ct. App.), *cert. denied*, 870 P.2d 957 (Utah 1993); no new time limit has been implemented); *id.* § 78-12-31.2 (no post-conviction remedies may be applied for or entertained by any court within 30 days prior to the date set for execution of a capital sentence, unless they are based on facts or circumstances developed or first became known within that period); *Stewart v. State By and Through Deland*, 830 P.2d 306, 309 (Utah Ct. App. 1992) (standard for granting post-conviction relief: must be a "substantial likelihood that had certain evidence been available at the time of trial, a different verdict would have resulted"); *Ward v. Turner*, 12 Utah 2d 310, 366 P.2d 72, 74 (1961) (to grant relief under the petition, "the evidence of [petitioner's] innocence must be stronger than would be necessary in the first instance in support of a motion for a new trial"), *cert. denied*, 371 U.S. 872 (1962)

CLEMENCY, ETC.

UTAH CONST. art. VII, § 12; UTAH CODE ANN. §§ 77-27-5 to 77-27-5.5 (Supp. 1993); *id.* § 77-27-5.5(6) (to commute a death sentence, Parole Board may not consider legal or constitutional issues that were or could have been raised in the courts, nor commutation requests based on "new information" which are subject to judicial review); *Foote v. Utah Board of Pardons*, 808 P.2d 734, 735 (Utah 1991) (state habeas is available for review of Board of Pardons' decisions); *Combs v. Turner*, 25 Utah 2d 397, 483 P.2d 437, 441 (1971) (board has exclusive right to commute punishments and grant pardons after conviction); UTAH CONST. art. VII, § 12(3)(a) (Governor may only "grant respites or reprieves" which "may not extend beyond the next session of the board")

VERMONT

MOTION FOR NEW TRIAL

VT. R. CRIM. P. 33 (1983) (2 year limit); *State v. Richards*, 144 Vt. 16, 470 A.2d 1187, 1190 (1983) (standard for granting motion for new trial based on newly discovered evidence: (1) evidence "will probably change the result" upon retrial; (2) evidence discovered since trial; (3) due diligence; (4) evidence is material; and (5) not merely cumulative or impeaching)

POST-CONVICTION REMEDIES

VT. STAT. ANN. tit. 13, § 7131 (no time limit for filing claims of constitutional or statutory violations of U.S. or Vermont law)

CLEMENCY, ETC.

VT. CONST. ch. II, § 20

VIRGINIA

MOTION FOR NEW TRIAL

VA. SUP. CT. R. 1:1 & 3A:15(b) (1992) (21 day limit); *Odum v. Commonwealth*, 225 Va. 123, 130, 301 S.E.2d 145, 149 (1983) (applicant holds burden to show: (1) evidence discovered subsequent to trial; (2) due diligence; (3) "not merely cumulative, corroborative or collateral"; (4) material; and (5) newly discovered evidence "should produce opposite results on the merits at another trial")

POST-CONVICTION REMEDIES

Va. Dep't of Corrections v. Crowley, 227 Va. 254, 263, 316 S.E.2d 439, 443 (1994) (claims of newly discovered evidence pertaining solely to the issue of guilt or innocence are not cognizable on habeas corpus which tests the legality of the incarceration); *see also Coleman v. Thompson*, Record No. 920302 (Va. 1992) ("allegations of 'newly discovered' evidence are not cognizable in habeas corpus"); *cf.* VA. CODE ANN. § 8.01-654(B)(2) (On successive petitions, "[n]o [habeas corpus] writ shall be granted on the

basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition.")

CLEMENCY, ETC.

VA. CONST. art. V, § 12; VA. CODE ANN. §§ 53.1-230, 53.1-232 (1991)

WASHINGTON

MOTION FOR NEW TRIAL

WASH. R. CRIM. P. 7.6(a)(3) (motion for new trial based on newly discovered material evidence); *id.* 7.6(b) (10 day limit, which may be extended in the court's discretion); *State v. Williams*, 96 Wash.2d 215, 222-23, 634 P.2d 868, 873 (1981) (standard for granting a new trial based on newly discovered evidence: (1) "will probably change the result of the trial"; (2) discovered since trial; (3) due diligence; (4) material; and (5) not merely cumulative or impeaching); *see also State v. Swan*, 114 Wash.2d 613, 641-42, 790 P.2d 610 (1990) (same), *cert. denied*, 498 U.S. 1046 (1991)

POST-CONVICTION REMEDIES

WASH. R. CRIM. P. 7.8(b)(2) (motion for relief from judgment or order may be based upon newly discovered evidence which could not have been discovered within the 10 day limit for a motion for a new trial under WASH. R. CRIM. P. 7.6); *id.* 7.8(b) (must be filed within a "reasonable time," not to exceed one year); WASH. R. APP. P. 16.4(c)(3) (personal restraint petition filed with

appellate court [the Washington Supreme Court in capital cases] concerning "[m]aterial facts . . . which have not been previously presented and heard, which in the interest of justice require vacation of the conviction [or] sentence"); *In re Jeffries*, 114 Wash.2d 485, 493, 789 P.2d 731, 737 (1990) (capital case personal restraint petition applying *Williams* standard); WASH. REV. CODE ANN. § 10.73.090(1) (1 year limit on all petitions or motions for collateral attack); *id.* § 10.73.100(1) (time limit in § 10.73.090 does not apply to a petition based solely on newly discovered evidence "if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion"); WASH. REV. CODE § 7.36 (state habeas corpus similar to personal restraint petition; 1 year limit); *Toliver v. Olsen*, 109 Wash.2d 607, 612-13, 746 P.2d 809, 812 (1987) (noting "Supreme Court, Court of Appeals and superior court have concurrent original jurisdiction of habeas corpus proceedings seeking post-conviction relief"; allowing superior court to transfer habeas petition to appellate courts to treat as a personal restraint petition)

CLEMENCY, ETC.

WASH. CONST. art. III, § 9; WASH. REV. CODE § 10.01.120 (1992)

WEST VIRGINIA

MOTION FOR NEW TRIAL

W. VA. R. CRIM. P. 33 (no time limit); *State v. Catlett*, 180 W. Va. 447, 376 S.E.2d 834, 838 (1988)

(standard for granting new trial based on newly discovered evidence: (1) evidence appears to have been discovered since trial; (2) due diligence; (3) evidence is material and not merely cumulative; (4) evidence "ought to produce an opposite result" upon retrial; and (5) motion will be denied when "sole object of the new evidence is to discredit or impeach a witness on the opposite side")

POST-CONVICTION REMEDIES

W. VA. CODE § 53-4A-1 *et seq.* (1981) (contains no time limit nor an explicit provision for newly discovered evidence)

CLEMENCY, ETC.

W. VA. CONST. art. VII, § 11

WISCONSIN

MOTION FOR NEW TRIAL

WIS. STAT. § 809.30(2)(b) (1989-1990) (20 day limit); *State v. Boyce*, 75 Wis.2d 452, 457, 249 N.W.2d 758, 760-761 (1977) (standard for granting motion for new trial based on newly discovered evidence: (1) evidence is newly discovered; (2) moving party must not have been negligent in seeking to discover evidence; (3) evidence is material; (4) not merely cumulative; and (5) "reasonably probable that a different result would be reached on a new trial")

POST-CONVICTION REMEDIES

WIS. STAT. ANN. § 974.06 (contains no express provisions for newly discovered evidence); *id.* § 974.06(2) (no time limit); *Vara v. State*, 56 Wis.2d 390, 392, 202 N.W.2d 10, 11 (1972) (post-conviction petition under § 974.06 "is restricted to jurisdictional and constitutional issues"); *but see State v. Bembenek*, 140 Wis.2d 248, 409 N.W.2d 432, 434 (Ct. App. 1987) (request for a new trial on grounds of newly discovered evidence can be raised under § 974.06 as due process may require granting a new trial on the basis of newly discovered evidence after the time for bringing a post-conviction motion has passed; however, petitioner, "at a minimum," has burden to meet the five *Boyce* elements by clear and convincing evidence); *see also State v. Coogan*, 154 Wis.2d 387, 453 N.W.2d 186, 188 (Ct. App. 1990) (same)

CLEMENCY, ETC.

WIS. CONST. art. V, § 6; WIS. STAT. ANN. §§ 304.08 to 304.11

WYOMING

MOTION FOR NEW TRIAL

WYO. STAT. § 7-12-301(c) (1987) (2 year limit); WYO. R. CRIM. P. 33(c) (1992) (same); *Cutbirth v. State*, 751 P.2d 1257, 1259-60 (Wyo. 1988) (standard for granting motion for new trial based on newly discovered evidence: (1) discovered since trial; (2) due diligence; (3) "so material that it

would probably produce a different verdict" upon retrial; and (4) not cumulative)

POST-CONVICTION REMEDIES

WYO STAT. § 7-14-101 *et seq.* (provisions for post-conviction relief); *id.* § 7-14-103(d) (5 year limit); *id.* § 7-14-103(b)(i) (permits petition based on newly discovered evidence to relieve inmate of what would otherwise be a procedural bar against constitutional claims which were not raised on appeal); *see also Cutbirth v. State*, 751 P.2d 1257, 1261 (Wyo. 1988) ("Questions which may be raised by a motion for post-conviction relief are limited to those of constitutional magnitude which manifest a miscarriage of justice.")

CLEMENCY, ETC.

WYO. CONST. art. IV, § 5; WYO. STAT. § 7-13-801 (1987)

APPENDIX B

Federal Motion For New Trial Standard Under Fed. R. Civ. P. 33

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period. (as amended Feb. 28. 1966, eff. July 1, 1966; Mar. 9, 1987, eff. Aug. 1, 1987.)*

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* The Notes of Advisory Committee on Rules further provide:

1944 Adoption

This rule enlarges the time limit for motions for new trial on the ground of newly discovered evidence, from 60 days to two years; and for motions for new trial on other grounds from three to five days. Otherwise, it substantially continues existing practice. See Rule II of the Criminal Appeals Rules of 1933, 292 U.S. 661 [18 U.S.C. formerly following § 688]. *Cf.* Rule 59(a) of the Federal Rules of Civil Procedures, 28 U.S.C., Appendix.

1966 Amendment

The amendments to the first two sentences make it clear that a judge has no power to order a new trial on his own motion, that he can act only in response to a motion timely made by a defendant. Problems of

The federal court standard for considering Rule 33 motions is:

> (1) the evidence must have been discovered since the trial; (2) the party seeking the new trial must show diligence in the attempt to procure the newly discovered evidence; (3) the evidence relied on must not be merely cumulative or impeaching; (4) it must be material to the issues involved; and (5) of such nature that in a new trial it would probably produce an acquittal.

United States v. Lafayette, 983 F.2d 1102, 1105 (D.C. Cir. 1993) (citation omitted); *see also United States v. Pena*, 949 F.2d 751, 758 (5th Cir. 1991); *United States v. Swarek*, 677 F.2d 41, 43 (8th Cir. 1982), *cert. denied*, 459 U.S. 1102 (1983).

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double jeopardy arise when the court acts on its own motion. See *United States v. Smith*, 331 U.S. 469 (1947). These amendments do not, of course, change the power which the court has in certain circumstances, prior to verdict or finding of guilty, to declare a mistrial and order a new trial on its own motion. *See e.g., Gori v. United States*, 367 U.S. 364 (1961); *Downum v. United States*, 372 U.S. 734 (1963); *United States v. Tateo*, 377 U.S. 463 (1964). The amendment to the last sentence changes the time in which the motion may be made to 7 days. See the Advisory Committee's Note to Rule 29.

1987 Amendment

The amendment is technical. No substantive change is intended.